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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

NANCY CORINNE DYER AND J. RAYMOND DYER,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION AND UNION ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1015

NANCY CORINNE DYER AND J. RAYMOND DYER,
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v.

SECURITIES AND EXCHANGE COMMISSION AND UNION ELECTRIC COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B) is reported at 251 F. 2d 512. The Findings and Opinion and Order of the Securities and Exchange Commission (R. 26–44) [1] are set forth in Holding Company Act Release Nos. 13429 and 13450.

[1] The record in the court below was not printed, but parts thereof were multigraphed by petitioners pursuant to Rule 12 (f) of the court's rules. Nine copies have been filed with this Court.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958 (Pet. App. B). Petitioners' timely petition for rehearing was denied on February 25, 1958. The petition for a writ of certiorari was filed on May 20, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Where petitioners, pursuant to Section 24 (a) of the Public Utility Holding Company Act of 1935, sought review of an order of the Securities and Exchange Commission authorizing a registered holding company to solicit proxies in connection with the annual meeting of stockholders, is the review proceeding rendered moot because during its pendency the meeting was held and the proxies were voted?

STATUTE INVOLVED

Relevant provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. § 79a, *et seq.*, and the applicable rules and regulations, are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

Petitioners, J. Raymond Dyer and his daughter, Nancy Corinne Dyer, record holders of 350 shares of the common stock of Union Electric Company ("Union"), a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, *et seq.* ("the Act"), seek review of a judgment of the court below dismissing their petition for review of an order of the Securities and

Exchange Commission, dated March 21, 1957. The Commission's order granted Union authorization to solicit proxies in connection with its annual meeting of stockholders scheduled for April 20, 1957 (R. 42). The court below "dismissed as having become moot" the petition for review of the Commission's order (Pet. App. B, p. 33).

The Commission's jurisdiction over proxy solicitations with respect to a registered holding company is derived from Section 12 (e) of the Act. Section 12 (e) makes it unlawful to solicit proxies in respect of any securities of a registered holding company or any subsidiary company in contravention of "such rules and regulations or orders" as the Commission deems necessary or appropriate "in the public interest or for the protection of investors or consumers." Pursuant to Section 12 (e), the Commission issued a notice and order on February 27, 1957, prohibiting Union and all other persons from soliciting proxies for the 1957 annual meeting of Union's stockholders unless a declaration was first filed with the Commission and such a declaration was permitted to become effective. In compliance with this order, Union filed a declaration,[2] which included, *inter alia,* its proposed proxy statement, form of proxy or ballot, and estimated expenses in connection with its proposed solicitation of proxies. The solicitation, as authorized by the Commission, was for the purpose of electing direc-

[2] As noted in the Commission's Opinion, a "declaration itself is not material to be sent to a company's stockholders and is simply a document filed with this Commission giving the Company's own statement describing the subject matter of the filing" (R. 38).

tors and to obtain a vote of stockholders on several proposals of petitioners.

Petitioners had submitted to Union thirteen proposals in the form of resolutions or amendments to Union's by-laws for inclusion in Union's proxy statement and form of proxy. Eight of these proposals were included in the proxy statement and form of proxy which Union mailed to its stockholders. Petitioners' five other proposals were omitted on the ground that they did not meet the requirements of the proxy rules. The exclusion of these five proposals was one of the principal issues raised by petitioners in the court below.

For reasons discussed below, the Court of Appeals dismissed the petition for review on the ground of mootness. The court did not vacate the order of the Commission since, as the court said, the order "is not res judicata and will not tie the Commission's hands in the future" (Pet. App. B, p. 33).

DISCUSSION

1. Petitioners sought review of the Commission's order of March 21, 1957, pursuant to Section 24 (a) of the Act which gives the Court of Appeals "exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." After the parties had briefed and argued the case on the merits, the court below, *sua sponte,* dismissed the petition for review on the ground that the issues were moot. The court apparently reasoned that under Section 24 (a) its jurisdiction was limited to a determination as to whether the solicitation had been properly authorized

by the Commission. Since the proxy solicitations had been completed, the proxies voted, and the stockholders' meeting held, the court concluded that no relief of any kind could be granted under Section 24 (a) even if, on the merits, the Commission's order was erroneous.

While we believe petitioners' contentions on the merits to be insubstantial, we do not agree that review on the merits under Section 24 (a) was foreclosed by reason of mootness. In holding the case moot, the decision below is inconsistent with *Okin* v. *S. E. C.*, 145 F. 2d 913 (C. A. 2), and *South Carolina Public Service Authority* v. *S. E. C.*, 170 F. 2d 948 (C. A. 4), which also involved review of Commission orders under Section 24 (a) of the Act. Although at the time of decision in those cases the transactions authorized by Commission orders had been consummated, both courts affirmed on the merits and expressly rejected the argument of mootness. In the *Okin* case (145 F. 2d at 914), the court said: "Even though the order has been carried out, we do not think he [petitioner] should be deprived of his right to a review * * * and hence we shall not dismiss his petition as moot." In the other case (170 F. 2d at 951–952), the court said:

> We have no doubt, however, as to our power to order the parties to set aside the sale and restore the situation that existed prior to the entry of the orders if we thought them invalid for any reason. The power of the court to review orders of the Commissions and grant effective relief may not be defeated by compliance with the orders. The Chicago Junction

Case, 264 U. S. 258, 44 S. Ct. 317, 68 L. Ed. 667. * * *[5]

Under the reviewing authority conferred upon it by Section 24 (a), the court below sits as a court of equity, "and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action", *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373. In a particular context, though we do not urge that such is the situation here, "the exigencies of the case" may, of course, involve supervening equities which have arisen during the pendency of the review and as a consequence of which judicial relief may be inappropriate. But such considerations are addressed to the discretion of the court when reviewing the case on the merits, not to the court's judicial power. The court below, however, dismissed the petition for review for lack of power to review the merits.

While Section 12 (e) of the Act declares unlawful the solicitation of proxies in contravention of the requirements prescribed by the Commission's rules or orders, judicial relief is not necessarily limited to a declaratory determination that the proposed solicita-

[5] Cf. *In re Electric Power & Light Corp.*, 176 F. 2d 687 (C. A. 2), in which the court affirmed on the merits an order of the District Court enforcing a Commission order approving a plan of dissolution for a registered holding company. Without discussing the question of mootness, the court noted that the consummation dates for the provisions of the plan preceded the date of the court's decision (176 F. 2d at 689, fn. 5). A stay pending review of the merits by the Court of Appeals had previously been denied by this Court. *In re Electric Power & Light Corp.*, 337 U. S. 903.

tion was or was not properly authorized. If it is determined that the proxy solicitation did not comply with the proxy requirements, the reviewing court may grant such relief as may be appropriate to secure compliance with the regulations. In the instant case, for example, petitioners claimed, *inter alia,* that Union's proxy material in connection with the 1957 annual meeting of stockholders was deficient in that it failed to include certain proposals of petitioners. If the Commission erred in permitting the exclusion of these proposals, the reviewing court may still remand the case to the Commission and direct compliance with the proxy regulations with respect to these proposals at a special or the next regular annual meeting of stockholders. A direction to resolicit to correct a violation of the proxy requirements would also be within the equitable jurisdiction of the court. See *S. E. C.* v. *Transamerica Corporation,* 163 F. 2d 511, 518 (C. A. 3), certiorari denied, 332 U. S. 847.

2. Although we disagree with the decision below, we do not suggest that the petition for a writ of certiorari be granted at this time. We believe that it would be appropriate to defer disposition of the petition until the court below decides another case brought by the same petitioners, *Dyer* v. *S. E. C.,* No. 15,989, which is now before it and in which the identical question of mootness is involved.

In the pending case below, petitioners seek review of an order of the Commission which had authorized Union to solicit proxies in connection with the annual meeting of stockholders scheduled for April 21, 1958—the annual meeting following the 1957 meeting in-

volved in the present case. Petitioners also sought a stay pending review, pursuant to Section 24 (b) of the Act, contending that, if a stay were not granted, the stockholders' meeting were held, and the proxies were voted, the case would be moot under the instant decision of the court below. The Commission opposed this request for a stay, and for the first time was in a position to express its disagreement with the court's decision in the present case on the question of mootness, which, as the Commission stated to the court, was inconsistent with the decisions of the Second and Fourth Circuits noted above.[4] By order dated April 18, 1958, the court denied petitioners' application for a stay but granted petitioners "leave to brief and argue the question of the mootness of the review, as related to our holding in 15,765, Dyer versus Securities and Exchange Commission [the instant case], in connection with the hearing of this cause on its merits." Should the court below overrule its prior decision on mootness, it might also consider vacating its judgment in the instant case, and then decide both cases on the merits. The issues in the two cases, as petitioners have represented to the court below, "are virtually the same and, for the most part, have already been briefed in Case No. 15,765."

[4] When petitioners filed their petition for rehearing in the court below on the question of mootness, the Commission filed no statement of its views since Rule 15 (c) of the court's rules provides that no response to such petition "will be allowed unless the court of its own motion, after the filing of the petition, otherwise directs." The court below did not so direct.

CONCLUSION

For these reasons, it is respectfully suggested that disposition of the petition for certiorari be deferred until a decision is rendered in *Dyer* v. *S. E. C.*, No. 15,989, pending in the court below, and in which the identical issue of mootness is raised and is to be briefed and argued by specific order of the Court of Appeals. We shall inform the Court of the disposition below of *Dyer* v. *S. E. C.*, No. 15,989.

Respectfully submitted,

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JUNE 1958.

APPENDIX

1. Pertinent provisions of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a, provide as follows:

Section 12 (e), 15 U. S. C. 791 (e):

> It shall be unlawful for any person to solicit or to permit the use of his or its name to solicit, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, any proxy, power of attorney, consent, or authorization regarding any security of a registered holding company or a subsidiary company thereof in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

Section 24 (a), 15 U. S. C. 79x (a):

> Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such orders in the United States court of appeals within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file

in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. * * *

Section 24 (b), 15 U. S. C. 79x (b):

The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

2. The Commission has promulgated certain Rules under Section 12 (e). Those pertinent are:

[Rule U–61.] The solicitation of any authorization regarding any security of a registered holding company or subsidiary company thereof, except solicitations in connection with any reorganization subject to the approval of the Commission, or in connection with any other transaction which is or will be the subject of any application or declaration filed with the Commission, shall be subject to all rules and regulations now or hereafter adopted pursuant to section 14 (a) of the Securities Exchange Act of 1934 that would be applicable to such solicitation if such security were registered on a national securities exchange: * * *.

[Rule U–62 (a).] *General Provisions.*—No solicitation of any authorization, regarding any security of a registered holding company or a subsidiary company thereof, in connection with any reorganization subject to the approval of the Commission, or in connection with any other transaction which is or will be the subject of an application or declaration filed with the Commission, shall be made except pursuant to a declaration with respect to such solicitation which has become effective in the manner prescribed in paragraph (d) of this rule.

* * * * *

[Rule U–62 (c).] *Contents of declaration.*—Every declaration pursuant to this rule shall, if in connection with any reorganization, be filed on Form U–R–1. Every other declaration subject to this rule may be filed in connection with the application or declaration with respect to the proposed transaction, and shall contain, in addition to the information otherwise specified in such application or declaration, copies of any letters of solicitation proposed to be used, copies of all other documents proposed to be transmitted with such letter of solicitation, and a full statement of the manner in which the solicitation is proposed to be made.

* * * * *

[Rule U–62 (e).] *Order for hearing.*—If the Commission shall issue an order for hearing on a declaration under this rule, such declaration shall become effective only pursuant to the further order of the Commission and subject to such terms and conditions as the Commission may prescribe.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

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PETITIONERS' REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

SUMMARY OF ARGUMENT.

In reply to the brief of the Securities and Exchange Commission (herein called "SEC") petitioners oppose its suggestion that decision herein be deferred; point out the

error of its contention, voiced in support of deference, of the identicalness of both the issues and the mootness questions in the instant case and Case No. 15,989 below; show the conflicting mootness positions counsel for the SEC have taken in this case and the related cases referred to in the record here; show the unethical practices of SEC counsel, both herein and therein, in that connection; their factual misrepresentation herein, as shown by the record; their reference to material outside the record herein in order to impute an alleged admission against interest on the part of petitioners, unfounded in fact; the material omissions from the SEC's transcript of record as certified to the court below and their relation to the bona fides of the SEC's suggestion of deference; the SEC's failure to complete the perjury investigation it started herein and the relation of that failure to the bona fides of its said suggestion; and the aid its counsel, and the Solicitor General of the United States, are improperly seeking to afford Union Electric Company (herein called "Union") by the suggestion of deference contained in the Conclusion of their brief.

These matters are taken up in the following 10 points, to wit:

ARGUMENT.

1.

In its brief, page 7, the SEC urges this court to "defer disposition of the petition until the court below decides another case brought by the same petitioners, *Dyer v. S. E. C.*, No. 15,989, which is now before it and in which the identical question of mootness is involved."

In Case No. 15,939 the orders on review (Item 27, Exhibits A and C) are voidable. In the instant case the order

on review (Item 1, Exhibit A) is void. Oral argument was denied petitioners by the SEC herein (Pr. Rec. 28); due process was not accorded (*VIBC, Inc., v. FCC* (C. A. D. C. 1958), ... F. 2d ..., 26 L. W. 2663); hence, under Missouri law as well as under federal law, the order in the instant case is void. *Dougherty v. Manhattan Rubber Co.* (1930), 325 Mo. 656, 29 S. W. 2d 126, 128.

The 1958 stockholders' meeting in Case No. 15,989 could conceivably be held a mootness-causing intervening event, on the authority of the decision below. The hearing is set for September 12, 1958. But the 1957 stockholders' meeting in the instant case, since based on a void order, had no validity as an intervening event at all. The mootness questions involved are not identical at all.

2.

In support of its suggestion that this court defer disposition of this case the SEC, in its brief, page 8, states: "Should the court below overrule its prior decision on mootness, it might also consider vacating its judgment in the instant case, and then decide both cases on the merits."

Petitioners suggest that it is outside the jurisdiction of the lower court, and has been since March 14, 1958, when its mootness decision was handed down (Item 26), for it to "vacate its judgment in the instant case."

3.

Petitioners likewise suggest that to permit the mootness decision below to remain unreversed any longer than absolutely necessary could result in its continued spawning of untoward legal consequences. Three courts have already been misled. See *State ex rel. Dyer et al. v. Union Electric*

Co. et al. (St. L. App. 1958), 312 S. W. 2d 151; transfer denied June 9, 1958 by Supreme Court of Missouri, *Case No. 47,016;* and *SEC v. Dyer* (D. C. E. D. E. D. Mo. 1958), ... F. Supp ... (see Appendix A).

The decision below is clearly erroneous and should not be allowed to stand until the lower court, if it should so see fit, decides to try to do something about it. It was rendered sua sponte with no notice given or opportunity afforded to be heard on the mootness question, which question had not even been raised by the parties or by the court. Under Missouri law that is not due process. *Albert J. Hoppe, Inc., v. St. Louis Public Service Co.* (1950), 361 Mo. 402, 235 S. W. 2d 347. Nor is it under federal law, as this court knows.

In addition, in dismissing for mootness on the ground that the 1957 stockholders' meeting had been held, the lower court necessarily had to assume the validity of that meeting, which in turn depended on the validity of the order it had under review. It did so assume, thereby answering the very question before it on review. It decided it could not decide the case by deciding it. It abdicated its right of judicial review by exercising it. It held it had no jurisdiction under Art. III, Sec. 2 of the Constitution by assuming jurisdiction to decide that a valid meeting had been held.

Yet the order on which the validity of the meeting rested could not have been valid. *VIBC, Inc., v. FCC,* supra. None of the Commissioners who issued the order heard the oral argument, for though petitioners requested oral argument their request was denied (Pr. Rec. 28). The SEC order was entered by a nod of the head. Due process was violated by the SEC as well as by the court below. Yet, in effect, the court below ignored the SEC's denial of due process and held the meeting valid, a prerequisite to

its finding that the meeting constituted the mootness-causing intervening event. It is unreasonable for the SEC to ask this court to perpetuate that error, even for just a short time.

4.

The SEC's brief, page 8, referring to Cases No. 15,765 and No. 15,989, states: "The issues in the two cases, as petitioners have represented to the court below, 'are virtually the same and, for the most part, have already been briefed in Case No. 15,765.' "

Petitioners state that their alleged aforesaid representation to the court below is not in the record herein. It was lifted, out of context, from petitioners' (and intervenor-petitioner's) motion for extension of time within which to file their brief on the merits in Case No. 15,989, which motion was filed after the petition for writ of certiorari was filed herein. Having been lifted out of context the meaning of the alleged representation respecting the similarity of the issues in the two cases was distorted and changed. A comparison of the issues in the instant case, as shown by the petition for review below (Item 1), and the issues in Case No. 15,989 as shown by the petition for review therein (Item 27), shows their dissimilarity.

Petitioners state that by going outside the record herein to so quote petitioners, out of context, counsel for the SEC have sought to make this court believe that petitioners had made an admission against interest, an admission that because the issues in the two cases were the same this court might properly delay its action herein. Actually, it is petitioners' contention that the issues are dissimilar. And that is the contention of counsel for the SEC in Case No. 15,989, too, though they contend here that the issues "are virtually the same." In their May 6, 1958, brief in Case No. 15,989 (Item 39) they admitted the dissimilarity

of issues, stating, page 2: "It is our position that an extension of time for such purpose is not warranted. There is no justification for delaying the present review on the basis of what petitioners may do in the other case." They blow hot in Case No. 1. 989 on this dissimilarity of issues question, and cold here.

5.

The SEC's brief makes another factual misrepresentation. It states, page 8, that the "first time" the SEC was in a position to "express its disagreement" with the mootness decision below was when it opposed petitioners' application for a stay in Case No. 15,989. That was on April 17, 1958 (Item 29). Yet the SEC could have filed a petition for rehearing in the instant case any time within 20 days from the date the January 24, 1958, mootness decision herein was rendered (Item 19). Any time between February 12, 1958, when petitioners' petition for rehearing (Item 20) was filed below, and February 25, 1958, when that petition was denied (Item 21), the SEC could have filed its concurrence therewith. Rule 15 (c) of the court below did not preclude that, as the SEC's brief, page 8, fn. 4, asserts. That Rule, as pointed out in the petition herein, page 20, covers only responses, not concurrences. Indeed, the SEC could have expressed its disagreement to the court below any time up until the mootness decision was handed down, on March 14, 1958 (Item 26). Instead, it opposed stay of judgment, and on March 6, 1958, advised the lower court that it concurred in the court's decision that the instant case was "obviously moot" (Item 23). Thus, the SEC blew cold below, hot in Case No. 15,989 (Item 29), and is blowing luke warm here. Though it confesses the error of the court below it asks that the issuance of the writ herein be deferred.

6.

The SEC, by making said "first time" statement to this court, sought only, it is submitted, to save face. Actually, it has been working both sides of the street on this mootness question. In *SEC v. Dyer*, as shown by the opinion in that case (Appendix A), it took the position in connection with its attempted dismissal under Rule 41 (a) of the Rules of Civil Procedure that the case was moot. It stated in its May 8, 1957, brief to the U. S. District Court, page 6, which statement is quoted in the court's opinion, ... F. Supp. ... (see Appendix A), that "Since the meeting has been held and since the date has passed, it is submitted that the question of compliance with the order of February 27, 1957, is now moot." *SEC v. Dyer* is referred to in Pr. Rec. 106 as the SEC's injunctive action "in conjunction with Union" in the U. S. District Court in St. Louis.

Defendant in *SEC v. Dyer*, who is one of the petitioners here, filed his motion for a new trial therein, within time, alleging that fraud was perpetrated on the court by counsel for the SEC in order to achieve that dismissal for mootness. The allegation is supported by affidavit. The SEC filed no motion for a new trial, and the time for it to do so has passed. Nor has it filed any concurrence with defendant's motion, a procedure certainly open to it under the Rules and the law. It remains to be seen what it will do when defendant's motion for a new trial, which is pending, is heard. Oral argument has been requested by defendant. The order in *SEC v. Dyer* is shown in Appendix B.

7.

The same SEC counsel who perpetrated the alleged fraud in *SEC v. Dyer*, and who signed the May 8, 1957, brief in that case, signed the March 6, 1958, brief below (Item 23), the April 17, 1958, brief in Case No. 15,989 (Item 29), and

the June 11, 1958, brief to this court. They also signed the SEC's April 8, 1957, motion to dismiss the petition below (Item 5), alleging that petitioners were not "persons aggrieved," that their petition was "frivolous and was filed solely for delay," and contained "impertinent and scandalous allegations unsupported by the record." Yet certain items were missing from the record as certified to the court below by the Secretary of the SEC on May 6, 1957 (Item 7, Vols. I and II). The very items that petitioners alleged (Item 34, p. 7) proved Mr. McAfee's perjury were missing (Petitioners' Exhibits 11 and 21, Item 7, Docs. 41 and 47). They were not filed until September 25, 1957 (Item 7, Vol. III). In the "extended proceedings" referred to in the petition herein, page 14, which were necessary before the SEC could be induced to produce them, these same SEC counsel, and despite Rule 11 of the Rules of Civil Procedure, twice stated, falsely, that these missing Exhibits had been certified to the court below. See Items 9 and 12. The result was that petitioners' brief below (Item 15), and their printed record (Item 14), both due and filed August 20, 1957, and which the court had required be based on the original record as certified by the SEC (Items 10 and 13), could not refer to these missing exhibits. Another brief was required, which petitioners filed October 10, 1957.

8.

There is another factor which touches on the question of the good faith of SEC counsel herein. There were other omissions from the original record as certified to the court below by the Secretary of the SEC, which, though petitioners sought their inclusion (Items 8 and 11), have never been included in any record filed by the SEC below. These were the Post-Effective Amendments to Union's declaration, provided for in the order on review (Pr. Rec. 41). Nor were petitioners' Objections thereto ever included in

any transcript or other record filed by the SEC below. See Pr. Rec. 105. See Item 34, pp. 3, 4.

Union's Post-Effective Amendment No. 1 violated, petitioners contended in their Objections, Proxy Rule X-14A-9 (b). It was libelous of petitioner J. Raymond Dyer (Pr. Rec. 105). Union's Post-Effective Amendment No. 2 violated Proxy Rule X-14A-11 (H) (2) in that it falsely stated that the Harvard Law Record had consented to Union's "use of the previously published material as proxy soliciting material" when it had not, and had so advised both Union and the SEC. Yet the SEC approved these two Post-Effective Amendments, and expressly permitted them both to become effective (Pr. Rec. 105). It did not so notify petitioners, as it had formally stipulated in its order of March 15, 1957 it would (Pr. Rec. 101).

These two Post-Effective Amendments, and petitioners' Objections and the SEC's violation of its said formal notification order, formed the basis of defendant's defense in *SEC v. Dyer*. He pleaded "Lumbard's Law", as the pronouncement of Cir. J. Lumbard in *SEC v. May* (S. D. N. Y. 1955), 134 F. Supp. 247, 257, aff'd (C. A. 2, 1956), 229 F. 2d 123, came to be called in the *SEC v. Dyer* proceedings. "Lumbard's Law" is nothing more than the application of the doctrine of clean hands to proxy contests.

SEC Chairman J. Sinclair Armstrong, in his October 16, 1956, Introduction to Aranow and Einhorn's "*Proxy Contests for Corporate Control*" (1957), p. xviii, states: "We must be and are scrupulously neutral in proxy contests. We have no concern as to which side wins . . . The Commission does not go into court to help one side or the other in the contest, though that may be an ancillary result. The Commission goes into court only to protect the integrity of its rules and the public investor interests". The record in *SEC v. Dyer*, referred to in the record here (Pr.

Rec. 106) and shown by petitioner J. Raymond Dyer's affidavit (Item 34, pp. 3, 4) refutes that.

The same SEC counsel who signed the SEC brief herein are counsel of record in *SEC v. Dyer*. Four of them, at different times, appeared in the trial of that case. Defendant's affidavit there, filed in support of the fraud allegation voiced in his motion for a new trial, states that SEC counsel, being made aware, in a court suggested stipulation meeting with defendant, of his knowledge of the SEC's express approval of Union's Post-Effective Amendments Nos. 1 and 2, and of his contention of the applicability of "Lumbard's Law" to that express approval, thereupon, improperly and unethically, engineered the continuance that postponed the April 11, 1957, trial until after the April 20, 1957, stockholders' meeting, thus enabling the SEC, thereafter, to seek, and ultimately achieve, dismissal of its "abortive injunction proceedings" (Pr. Rec. 106), on the grounds of mootness occasioned by that intervening event.

9.

The Court below, though (Item 19) it considered the same, took no action on petitioners' motion (Item 16) that it refer the matter of Mr. McAfee's perjury to the U. S. Department of Justice. But the Department of Justice has had that matter before it since December 4, 1957. It has conducted an investigation (the FBI contacted petitioners' counsel in that connection), and on June 25, 1958, advised Congressman Clarence Cannon that it would let him know what conclusions it reached. It has not advised him further. The SEC "discontinued" its investigation in that connection on August 9, 1957, when it "dropped" the matter (Item 38).

It is suggested that if this case be remanded to the court below this court advise it what action it should take in

connection with petitioners' said motion (Item 16) concerning the referal of the McAfee perjury question to the U. S. Department of Justice with the request that the Department submit its findings to the SEC for use by petitioners in any further Union Electric proxy material proceedings there. The McAfee perjury is pertinent in Case No. 15,989 below, as well as in the instant case. Though the SEC confesses the error of the court below it makes no mention in its brief of petitioners' said motion to adduce additional evidence (Item 16), nor does it suggest what advices this court should give the court below in that connection should this case be reversed and remanded.

Petitioners also suggest that if this court defers its decision herein until after Case No. 15,989 has been decided by the court below, this question of perjury will very effectively have been removed from that case to the very great advantage of Mr. McAfee and Union's management in their future solicitation of proxies from Union's stockholders.

10.

Union, though notified of these proceedings and served with copies of the petition herein, filed no opposing brief. Yet it was granted leave to intervene below (Item 3). That leave was granted in an ex parte proceeding, in chambers, with no opportunity afforded petitioners to be heard.

When Union sought leave to intervene in Case No. 15,989 the matter was handled in open court. Petitioners opposed the intervention, as the order granting Union leave to intervene shows (Item 30). Union was not a "person or party aggrieved" under Sec. 24 (a) of the Holding Company Act, and sought only to defeat the review, nothing more.

Petitioners submit that Union, who speaks only through the SEC and the Solicitor General here, is not an inter-

venor as of right under Rule 24 (a) of the Rules of Civil Procedure. It was accorded only permissive intervention under Rule 24 (b). But neither in the instant case, nor in Case No. 15,989, does Union seek any affirmative relief, or make any "claim in addition to the issues in the main suit." Yet that is essential to intervention under Rule 24 (b). *Bernstein v. N. V. Nederlandsche-Amerikaansche etc.* (S. D. N. Y. 1948), 76 F. Supp. 335, 349; *Kind et al. v. Markham* (S. D. N. Y. 1945), 7 F. R. D. 265, 266; *Am. Optical Co. v. N. J. Optical Co.* (D. C. Mass. 1943), 3 F. R. D. 169, 170; *Owen v. Paramount Productions, Inc.* (S. D. Cal. 1941), 41 F. Supp. 557, 561. There must be some dissimilarity of issues on which to base an award of permissive intervention. *Mullins v. De Soto Securities Co.* (W. D. La. 1942), 2 F. R. D. 502, 504. That is likewise the Missouri law. *McNellis et al. v. Kansas City et al., Cross et al, Intervenors* (K. C. App. 1940), 143 S. W. 2d 477, 478.

Petitioners submit that if this court remands this case it should advise the lower court respecting the legality of its continued according of intervenor status to Union. That intervention unduly burdens petitioners, both in the instant case and in Case No. 15,989, and unduly prejudices "the adjudication of the rights of the original parties," contrary to Rule 24 (b).

Just why the SEC and the Solicitor General seek delay herein petitioners do not know. They can see no benefit accruing to the SEC or to the Solicitor General therefrom. Petitioners do, of course, see the great benefit that will accrue to Union's management if this court's disposition of the petition herein is deferred. If this court's decision is deferred until after the decision of the court below in Case No. 15,989, and if that court follows its decision herein, Union's management will be left free "to water Union's common stock to the extent of approximately $30,000,000, to the unjust enrichment of management to

that extent." That is the result pleaded in petitioners' verified application for a stay in Case No. 15,989 (Item 28), which application the court denied (Item 33).

That, petitioners believe, is why the SEC (Item 29) and Union (Item 31) so belatedly, but so insistently, confessed the error of the mootness decision below. They were opposing petitioners' stay application in Case No. 15,989. And in that stay application, heard April 17, 1958 (Item 32), petitioners pleaded (Item 28, p. 4) that, in view of the precedental effect of the mootness decision herein, they would be out of court unless the stay were granted, though approximately $30,000,000 in injury to the stockholders was involved, since the April 21, 1958, stockholders' meeting was coming up. To render that argument ineffectual both the SEC and Union contended that the mootness decision below was error, and that petitioners, if the court in Case No. 15,989 overruled its mootness decision herein, would not be out of court even though, before decision on the merits could be rendered, the April 21, 1958, stockholders' meeting should have been held. Which, presumably, was why the court, in its April 18, 1958, order denying the stay application, granted petitioners leave to brief and argue the mootness question in Case No. 15,989 (Item 33).

The record herein (Item 34) shows numerous allegedly improper activities on the part of the SEC in aid of Union, both in this case, in *SEC v. Dyer*, and in Case No. 15,989. There have been others, outside the record, which are under consideration by the House Subcommittee on Legislative Oversight. See Item 15, page 80, and Item 20, pages 13, 14. Petitioners submit that the Conclusion voiced by the SEC in its brief, signed by its counsel and by the Solicitor General of the United States, is of that class. The delay will benefit only the management of Union.

CONCLUSION.

The petition for writ of certiorari herein should be granted and the decision below should be reversed and remanded forthwith, without briefs or argument.

Respectfully submitted,

J. RAYMOND DYER,
Attorney for Petitioners.

APPENDIX A.

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Securities and Exchange Commission, Plaintiff, vs. J. Raymond Dyer, Defendant.	Cause No. 57C201 (1). Court No. 1.

Memorandum Opinion.

On April 9th, 1957, the SEC filed a complaint in this Court seeking equitable relief against J. Raymond Dyer. The Commission sought, in its carefully drawn pleading, a temporary restraining order and a preliminary and final injunction (1) against defendant's use of the mails or other instrumentalities of interstate commerce to solicit proxies, or otherwise engage in a solicitation, in connection with the April, 1957, shareholders' meeting of the Union Electric Company without first complying with an order of the Commission dated February 27th, 1957, and the rules of the Commission adopted pursuant to Section 12 (e) of the Public Utility Holding Company Act; (2) against defendant's use of the mails, or other instrumen-

talities of interstate commerce, to persuade, influence, or otherwise solicit Union's shareholders except in compliance with the law; and (3) particularly against defendant's use of the mails to distribute a postcard to Union's shareholders which contained the statement that defendant had filed objections in the United States Court of Appeals [for the 8th circuit] to the plaintiff's approval of certain proxy material distributed by the Union Electric management. This Court did not at that time, after receiving certain assurances from defendant, grant a temporary restraining order, nor did a preliminary injunction later issue.

On April 23, 1957, after the conclusion of the Union Electric shareholders' meeting, plaintiff filed in this action a notice of dismissal under Rule 41 (a). The Court, on motion of defendant, vacated this notice of dismissal on the ground that, although no pleading formally designed an "answer" had been served, the parties were, in fact, at issue on the allegations of the complaint, and that the time had passed when plaintiff could dismiss without leave of court or consent of the defendant. Plaintiff did not thereafter file a motion under Rule 41 (a) 2 seeking to dismiss its action by leave of court.

Defendant Dyer then filed, on April 26th, 1957, his Answer and Counterclaim (subsequently amended). Plaintiff's reply to the counterclaim challenged the jurisdiction of this court to grant the requested relief, i. e., order the SEC to conduct certain investigations of the alleged actions, associations and connections of persons related to the proxy contest at Union Electric. This Court accepted the Commission's view on the jurisdictional issue raised in the Reply, and has declined to vacate that ruling, despite the defendant's assertion that it is in error.

This present case is not the first occasion on which defendant Dyer and the SEC have met. Plaintiff's action in permitting certain proxy material of the Union Electric management for the same April, 1957, shareholders'

meeting to become effective was challenged by defendant in a petition for review filed in the Court of Appeals for this circuit. Dyer v. SEC, 251 F. 2d 512 (C. A. 1958), now pending in the United States Supreme Court on Dyer's petition for writ of certiorari. The Court of Appeals, having previously denied defendant a stay of a disputed order, heard argument on the petition for review subsequent to the conclusion of the shareholders' meeting and dismissed the proceeding as moot.

This Court does not see how a decree in this case could be of any more effect than the relief defendant sought in the litigation over the propriety of the Order of March 21, 1957. An examination of the prayer for relief in the Complaint will, the Court believes, show that a decree drawn within its confines could not affect the rights and obligations of parties as they now stand in any meaningful way. Although neither party took this view of the matter at the conclusion of the trial on the merits, plaintiff in its brief filed in support of its attempted dismissal under Rule 41 (a) 1 said:

> "The Commission could only ask your Honorable Court to enjoin solicitations to that date under the Order of February 27, 1957. It is submitted that this is so regardless of the results of any other legal proceedings in the District Court or in the Court of Appeals. If another meeting were to be required as a result of such litigation, it is submitted that the Commission would have to issue an order directed to said meeting. If the defendant were to persist in a solicitation of shareholders, he would have to comply with other rules of the Commission, not the Order of February 27, 1957. These matters would constitute other legal controversies because they are beyond the scope of the Commission's order of February 27, which is the sole subject matter of the complaint herein. Since the meeting has been held and since the date has

passed, it is submitted that the question of compliance with the order of February 27, 1957, is now moot."

A similar problem was before the Second Circuit in *SEC v. Okin*, 132 F. 2d 784, which on a set of pleadings apparently broader in scope, and in a continuing controversy, arrived at a different result. This Court does not believe that the instant case presents itself for any action other than dismissal for mootness.

An Order will be entered in accordance with this Opinion.

Dated this 28th day of July, 1958.

(signed) Geo. H. Moore,
United States District Judge.

APPENDIX B.

In the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri.

Securities and Exchange Commission, Plaintiff, vs. J. Raymond Dyer, Defendant.	Cause No. 57C201 (1). Court No. 1.

Order of Court.

The Court having heard the evidence and arguments of the parties Doth Find that the instant cause is now moot and Doth Order that said cause be and the same is hereby dismissed as moot.

Dated this 28th day of July, 1958.

(signed) Geo. H. Moore,
United States District Judge.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 67.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' SUPPLEMENTARY REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

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IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' SUPPLEMENTARY REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

STATEMENT.

This brief is filed by leave under Rule 24 (4) of this court. The SEC, in its brief herein, suggested that this court defer its decision until the court below had decided

Dyer v. SEC, Case No. 15,989. That case was heard November 17, 1958, at which time the SEC and petitioners both filed supplementary briefs. Union objected to the filing of petitioners' supplementary brief on the ground that it was "factually unfounded and scandalous". Though afforded opportunity, neither it nor the SEC filed any response.

In their said supplementary brief petitioners called the attention of the court below to *WKAT, Inc. v. FCC* (CA DC), 258 F. 2d 418, published October 20, 1958. In line with that decision the U. S. Attorney General, on November 8, filed an amicus curiae brief with Judge Horace Stern, the special FCC hearing officer in the remanded *WKAT* case, and on November 10 counsel for the FCC filed his brief. Petitioners' November 17 supplementary brief in Case No. 15,989 was based on that decision and those briefs.

On December 1 Judge Stern issued his decision in the remanded *WKAT* case, which had been consolidated before the FCC with the cases of three other Channel 10 Miami television applicants. Judge Stern held that FCC Commissioner Richard A. Mack should have disqualified himself in the initial FCC proceedings, and that two of the applicants, WKAT, Inc. and Public Service Television, Inc., who in the initial proceedings had made improper ex parte contacts with Mack, were thereby disqualified. Though Public Service had been awarded Channel 10 initially, and had been operating on it over its station WPST since August 2, 1957, Judge Stern did not hold the remanded case moot. He recommended that the award be revoked.

SUMMARY OF ARGUMENT.

In the light of the court decision in *WKAT*, and the law as set forth in the aforesaid brief of the FCC, in the amicus brief of the U. S. Attorney General and in Judge Stern's decision, the mootness ruling of the court below was error and should be reversed regardless of whatever action in Case No. 15,989 it may take. Bias and prejudice were charged in the petition below (Item 1, para. 6), and in the light of the subsequent May 24, 1957 report of the Department of Justice (Item 37; Pr. Rec. 106) that bias and prejudice were shown. The shielding of perjury on the part of Union's president by the SEC was likewise charged (Item 34, para. 20) and likewise shown (Items 16 and 27, Ex. B).

There were also ex parte contacts made by Union with the SEC, which rendered the order under review void. The court below should have remanded the case, as in *WKAT*, regardless of the fact that the stockholders' meeting had been held and the proxies voted. Improprieties of procedure violating due process preclude dismissal for mootness.

As the record in the instant case conclusively shows (the matter stands admitted), though Union was at all times a registered public utility holding company the SEC, initially, considered its proposed proxy material under the Securities Exchange Act of 1934, and not under the Public Utility Holding Company Act of 1935, as it should. Different standards apply. See *Halsted v. SEC* (CA DC 1950), 182 F. 2d 660, 662. Before the March 13-15, 1957 hearing was held, or even scheduled, the SEC approved Union's proxy material, approved the exclusion therefrom of petitioners' By-Law and Resolution proposals, and their other proposed recitals, and found Union's November 18, 1956 ads, and its November 19, 1956 stockholder communica-

tions, not to constitute solicitations under Rule X-14A-1. Thus the case had already been decided before the hearing was held. The SEC entered the order under review with bias and prejudice as those terms are defined in *Black*. Cases that are pre-decided, and hence determined with bias and prejudice, are not moot.

To find this case moot the lower court had to find, as it did, that the stockholders' meeting had been held. But if there was material perjury, and improper ex parte contacts, and a predetermination, the case was not moot. Instead, the order under review was void and the meeting was invalid.

Furthermore, if any of the SEC Commissioners should have disqualified himself the order was void and the meeting was invalid. An invalid sanction of a meeting, no more than the invalid bestowal of a television channel or a patent, cannot support a mootness holding.

Finally, at the time the mootness decision below was handed down on March 14, 1958 (Item 26) the controversy here had already become a continuing controversy, as the court below had been made aware (Item 24). The March 6-7, 1958, SEC hearing on Union's 1958 proxy material had already been held. Case No. 15,989 was filed April 4, 1958 (Item 27). After the November 17, 1958, hearing in that case petitioners notified the SEC that they would controvert Union's 1959 proxy material if it named any of Union's present directors as proxy agents or sought their re-election to Union's board. See Appendix A hereof. Continuing controversies are not moot, but continuation can only be shown supplementally.

ARGUMENT.

1. Disqualifications.

In *Precision Instrument Mfg. Co. v. Automotive M. M. Co.* (1945), 324 U. S. 806, this court stated, l. c. 819, that "Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all the facts concerning possible fraud or inequitableness underlying the applications in issue." In his amicus brief to Judge Stern, p. 27, the U. S. Attorney General cited that case in support of his contention that it was the "duty" of all the Channel 10 applicants, if they believed improper activities were taking place, "to inform the Commission and other interested law-enforcement agencies", even though they had "reasonable doubts as to the sufficiency of the proof of the inequitable conduct".

In the instant case petitioners reported to the court below the alleged March 13, 1957, perjury of Mr. McAfee in their brief of October 10, 1957, on the admissibility of their Exhibits 11, 12, 14, 18, 19 and 21, which Exhibits were not filed by the SEC until September 25, 1957 (Item 7, Vol. III, Docs. 41-46). They likewise pointed it out in their November 19, 1957, motion to adduce additional evidence (Item 16). Copies of that brief and that motion were duly served on the SEC. Petitioners also reported the alleged perjury to the U. S. Department of Justice (Item 34, para. 19), before the decision below was rendered.

However, the U. S. Attorney General did not come into this case or Case No. 15,989, as amicus curiae. Neither the SEC nor the Department of Justice did anything. In the *Precision Instrument* case, where the history of the patent was "steeped in perjury" (l. c. 816), it was not reported to the Patent Office or the Department of Justice.

Mas v. Coca-Cola Co. (C.A. 4, 1947), 163 F. 2d 505, likewise cited by the U. S. Attorney General in his brief to

Judge Stern, and by Judge Stern in his said decision, also dealt with perjury before the Patent Office. The court held, l. c. 510, that patents are "affected with a public interest". No one can be given one if his conduct in securing it is "clouded with forgery, and perjury or fraud". The operation of a public utility is affected with a public interest, too.

In the instant case the petition for review (Item 1, para. 6) alleges bias and prejudice and favoritism on the part of the SEC. When Union's 1958 proxy material was before the SEC, petitioners sought the disqualification of Commissioners Orrick, Patterson, Hastings and Sargent on the grounds of bias and prejudice and favoritism, alleging the March 13, 1957, perjury of Mr. McAfee and the belief (Item 34, para. 20) that said Commissioners "have shielded said material perjury of Union president J. Wesley McAfee, and will continue to shield it insofar as they are able". The petition for review in Case No. 15,989 alleges the bias and prejudice and favoritism of said Commissioners, the "commitment" of the first named three, and the refusal of all four to disqualify themselves (Item 27, para. 5 and para. 7).

In its March 21, 1958, Findings and Opinion in Case No. 15,989 the SEC (Commissioner Sargent not participating) found (Item 27, Ex. B) that the question of the truth of Mr. McAfee's "report" on Union's 1955 Illinois lobbying venture was "not an issue in these proceedings," and that, as regards his testimony respecting the truth of that report, "the present proceedings are not a proper forum for the raising of this matter since the accuracy of such testimony is not an issue herein." The SEC also found that "the hearing examiner properly denied Dyer's offer of proof concerning the accuracy of certain testimony of Union's president in the hearings with respect to management's proxy material for the 1957 meeting of stockholders."

If a deliberate misrepresentation of material facts by an applicant for a patent or for a television channel (*FCC v. WOKO, Inc.* [1946], 329 U. S. 223) is ground for that applicant's disqualification, we submit that the question of whether there has been deliberate misrepresentation of material facts by a public utility president seeking SEC approval of proxy material naming him as a proxy agent and director is pertinent to the qualification of that individual to receive SEC approval of that proxy material. That question of qualification is not moot while that individual is still a member of declarant's board, as Mr. McAfee is. See *Root Refining Co. v. Universal Oil Products Co.* (CA 3, 1948), 169 F. 2d 514, 541, and *Keystone Driller Co. v. General Excavator Co.* (1933), 290 U. S. 240, 244-5, both cited by Judge Stern.

We further submit that by their approval (Item 7, Doc. 39) of his "report" (if it ultimately be found false in the light of Petitioners' Exhibits 11 and 21 [Item 7, Docs. 41 and 46] and the Department of Justice report, Item 37), and by ordering it released to the press, inserted in the press as a paid advertisement and sent to the stockholders, without first making at least some inquiry as to its truth (Item 7, pp. 282, 284), and by their sponsoring of Union's actions herein, Mr. McAfee's co-directors failed to meet the standards of the Public Utility Holding Company Act as set forth in *Halsted v. SEC* (C. A. D. C. 1950), 182 F. 2d 660, 662, and thereby disqualified themselves for service as proxy agents or directors elected through the use of proxy material subject to SEC approval. That question of their qualification, so long as they are still serving as directors, as they are, is not moot. *Mester v. U. S.* (E. D. N. Y. 1947), 70 F. Supp. 118, aff'd 332 U. S. 749.

2. **Continuing Controversy.**

Controversies that are continuing are not moot. See Petition for Rehearing herein, pp. 21-24 (Item 20). The controversy here, which started in 1957, was continued in

1958 and will be continued in 1959. See Appendix A. The controversy between petitioners and Union was renewed at the December 8-9, 1958, hearing before the Missouri Public Service Commission, on Union's application for a $7,893,000 per annum rate increase. Petitioners sought intervention as stockholders and consumers and Union opposed their intervention. Intervention was allowed.

3. **Ex Parte Contacts.**

There were ex parte contacts made by Union with the SEC, as shown by the record. Mr. McAfee, Union's president, testified to one (Item 7, p. 80). When asked if Miss Dyer's By-Law banning false advertising, proposed under Missouri law, was submitted for inclusion in management's proxy material Mr. McAfee said he had grave doubt, and that, in fact, "I came here to attempt to ascertain whether it complied with the rules . . . We came to the SEC." The SEC excluded it, without assignment of reason.

Another ex parte contact may be inferred from the statement of Mr. Woodbridge, Union's vice-president. Mr. Shapiro, Union's secretary, had testified (Item 7, p. 242) that on March 6, 1957, letters in connection with Union's proxy solicitation had been sent to bankers and brokers holding Union stock as fiduciaries—"750 or 800 copies" of each letter (Id., p. 243). That was after the order of February 27, 1957 had been entered, prohibiting all solicitation except pursuant to Rule U-62 and a declaration permitted to become effective (Pr. Rec. 42). Rule U-62 (c) requires the declaration to contain "copies of any letters of solicitation proposed to be used". Union's declaration did not contain copies of those March 6, 1957 letters, though it was filed March 4, 1957 (Item 7, p. 271). They were not introduced into evidence at all.

Mr. Woodbridge stated (Item 7, p. 271) that he sent Mr. Dyer a copy of Union's declaration on March 8, 1957, "the first day I got back to the office after I was here in Wash-

ington", and that he did not receive Mr. Dyer's letter of March 2, 1957 until then. During the interval he was in Washington, presumably in connection with the filing of Union's declaration. The implication is that either Union sent out its "750 or 800" letters to bankers and brokers without SEC sanction, or that such sanction was accorded Mr. Woodbridge at some ex parte meeting in Washington during his presence there on or before March 6, 1957, when the letters were sent out.

Another ex parte contact was had over the telephone, between Mr. Woodbridge and Joseph S. Mitchell, Jr., of the SEC's Division of Corporate Regulation. On March 21, 1957 Union had submitted its Amendment No. 4, and on March 22 its Post-Effective Amendment No. 1 (Item 34, Ex. A). Petitioners had immediately objected to both (Pr. Rec. 105). Union then filed its Post-Effective Amendment No. 2, slightly modifying No. 1, and Mr. Woodbridge telephoned the SEC asking for clearance. He did not notify petitioners as he had stipulated he would (Item 7, pp. 9, 13).

Mr. Mitchell had also stipulated that he would give petitioners notice of "every step" taken (Item 7, pp. 13, 273), and the SEC had embodied both stipulations in its formal order of March 15, 1957 (Pr. Rec. 101). Nonetheless, without notice to petitioners and in violation of his stipulation and that formal SEC order, Mr. Mitchell approved Union's Amendment No. 4 and Post-Effective Amendment No. 1 as amended by No. 2, in that ex parte telephone conversation with Mr. Woodbridge. Mr. Mitchell admitted that ex parte approval to Hon. George H. Moore, in chambers on April 9, 1957, in proceedings in *SEC v. Dyer* (E. D. Mo. 1958), 22 F. R. D. 229. See Item 34, para. 8; Pr. Rec. 105.

Ex parte contacts formed the basis of Judge Stern's decision in the remanded *WKAT* case. Applicable cases are *Berkshire Employees Ass'n v. NLRB* (C. A. 3, 1941), 121 F. 2d 235; *Inland Steel Co. v. NLRB* (C. A. 7, 1940), 109

F. 2d 9; *Montgomery Ward & Co. v. NLRB* (C. A. 8, 1939), 103 F. 2d 147; *NLRB v. Phelps* (C. A. 5, 1943), 136 F. 2d 562; *Ohio Bell Tel. Co. v. Pub. Util. Com.* (1937), 301 U. S. 292; *Trans World Airlines, Inc., v. CAB* (C. A., D. C. 1957), 254 F. 2d 90; *In re Murchison* (1955), 349 U. S. 133; *Tumey v. State of Ohio* (1927), 273 U. S. 510; *FCC v. Broadcasting Co.* (1940), 309 U. S. 134.

Judge Stern also cited and quoted *Deuteronomy 16:19* and Sir Edward Coke's statement at the Assizes in Norwich, August 4, 1606 (*Am. Bar Asso. Jour.*, Vol. 44, No. 9, pp. 862, 864) and several other classical authorities, all to the effect that a judgment "tainted by partiality" cannot stand. See *Chafee: Clean Hands Doctrine*, 47 Mich. L. R., 877-906, 1065-1096.

4. Predetermination.

That the SEC conducted an ex parte "trial run" of this case under the inapplicable Securities Exchange Act of 1934, i. e., conducted a sort of private "dress rehearsal" before it set the stage for the March 13-15, 1957 public hearing under the Public Utility Holding Company Act of 1935, is amply shown by the record. Union's declaration was filed March 4 (Item 7, p. 16). But Union filed its proxy material "in preliminary form" on February 18 (Id., pp. 18, 270), without notice to petitioners. Petitioners were sent a copy of Union's proxy material on March 8 (Id., p. 271). During the interval the ex parte "dress rehearsal" was held.

On that ex parte "trial run" Union objected to the inclusion of petitioners' proposed Resolution banning false advertising. Miss Dyer's proposed By-Law banning false ads had already been taken care of by Mr. McAfee (Item 7, p. 80). Mr. McAfee testified to Union's "trial run" objection to the Resolution, too (Item 7, p. 91). It was excluded, along with the By-Law. As Mr. Dyer stated at the hearing, the SEC, before the hearing, had already ruled

against the inclusion of those two false ad prohibitions (Id., pp. 95, 141, 311 and 325).

Indeed, all five of petitioners' rejected proposals were excluded in the ex parte "trial run," without affording petitioners opportunity to be heard (Item 7, p. 233). Mr. Mitchell stated that Union's material was "confidential," and that petitioners were "not entitled" to copies (Id., p. 272). Mr. Hennegan, of the SEC's Division of Corporation Finance, admitted that his Division's pre-trial ruling was that petitioners' mine stockholder By-Law was "legal under the laws of Missouri" (Id., p. 345). Petitioners' father-mother-guardian By-Law was similarly ruled off before the hearing (Id., p. 413).

The same was true as regards the ruling that Union's ads of November 18, 1956 (Item 7, Docs. 24, 25) and its November 19, 1956 communication to the stockholders (Id., Doc. 2) were not solicitations under Rule X-14A-1. Mr. Hennegan admitted that pre-trial ruling (Item 7, p. 211). Commissioner Orrick confirmed that "dress rehearsal" evaluation, in a letter to Mr. Dyer. That letter is in petitioners' supplementary record, the filing of which was authorized by the court below (Items 10 and 13).

Union's deletion of two sentences from petitioners' Statements in Support of two of their included proposals, one sentence charging Union's management with immoral lobbying and the other with malfeasance in office, was likewise prejudged and sanctioned (Item 7, pp. 293, 295). The February 21, 1957 letter of Mr. Hennegan's Division so stating is in petitioners' supplementary record. Commissioner Orrick sanctioned that pre-trial deletion (Item 7, p. 293). And then adhered to it, despite Petitioners' Exhibits 11 and 21 (Item 7, Docs. 41 and 46), which clearly refuted the pre-trial ruling. Commissioner Orrick and his fellow Commissioners held the deleted sentences to be "without factual foundation" (Item 34, para. 21; Item 15,

being petitioners' brief below, pp. 54-57), though they refused to pass on the "foundation" (Pr. Rec. 33, fn. 5).

In justification of these predeterminations Mr. Mitchell stated (Item 7, p. 96) that "what the Commission ruled under Regulation X-14 of the Securities Exchange Act is not completely applicable here. We are under a new set of rules under the Public Utility Holding Company Act of 1935, and the Commission has not ruled on what will be admitted or what will not be admitted under the 1935 Act. Now, what it ruled under the '34 Act is not particularly pertinent to what it might rule under the '35 Act."

We submit that what the SEC did was rule under the inapplicable '34 Act and then apply those rulings under the Act of '35. That is like prejudging grand larceny under the law of petit larceny and then carrying the ruling over. The SEC not only ignored *Halsted v. SEC*, supra; it prejudged the case. Sections 7 and 8 of the Administrative Procedure Act *(5 USCA 1006-7)* clearly provide for judicial-like proceedings. What the SEC did was what the court in *Berkshire Employees Ass'n v. NLRB*, supra, called "too violent a departure from what many generations of English speaking people have come to regard as essential to fair play."

Mr. Mitchell contended (Item 7, p. 415): "The Commission hasn't decided anything, Mr. Dyer. The Commission just gave comments to Union Electric Co. on material that was submitted to it." If a "comment" is not a decision, albeit an informal one, we do not know what is. See *Peck v. Greyhound Corp.* (S. D. N. Y. 1951), 97 F. Supp. 679, and *Aranow & Einhorn; Proxy Contests for Corporate Control* (1957), p. 417.

We submit that the SEC based its Findings and Conclusions on those "comments to Union Electric Co." The language is the same. It then refused to certify those "comments" to the court below, forcing petitioners to include them in its supplementary record.

Black defines bias as "inclination; bent . . . a preconceived opinion; a predisposition to decide a cause or an issue in a certain way." To prejudge is to predispose. Prejudice, according to *Black*, is "a leaning toward one side of a cause for some reason other than a conviction of its justice." The desire of the SEC to be consistent, to have its Findings and Opinion support its "comments" regardless of the evidence, is just such a reason.

Predetermination goes to due process. *Morgan v. U. S.* (1936), 298 U. S. 468; Id. (1938), 304 U. S. 1. It renders the subsequent hearing a farce. "Justice must satisfy the appearance of justice," as this court said in *In re Murchison*, supra, l. c. 136. See also *Connelly v. U. S. Dist. Court* (C. A. 9, 1951), 191 F. 2d 692, 697.

Though Mr. McAfee stated (Item 7, p. 163) that he was "sure" his fellow directors would be "perfectly willing to testify," and though petitioners asked that they be called (Item 7, Doc. 15, pp. 21-22) to fill in the gap of Mr. McAfee's hearsay testimony (Item 7, p. 153) respecting their intentions when they ordered his "report" released to the press, inserted therein as paid ads and sent to the stockholders, the SEC did not call them or permit petitioners to call them. It had predetermined the case. In the 1958 proceedings, when petitioners asked that they be subpoenaed, that "request for the issuance of subpoenaes" was denied (Item 27, Ex. B). In that way the SEC shielded the 1957 perjury of Mr. McAfee (Item 34, para. 20).

The denial of subpoena privilege is not something that can be rendered moot. *Inland Steel Co. v. NLRB*, supra, l. c. 18. Where there is a "distinct hampering of inquiry" the case is not moot. *Montgomery Ward & Co. v. NLRB*, supra, l. c. 156. As this court said in *FCC v. Broadcasting Co.*, supra, l. c. 143:

> "The laws under which these agencies operate prescribe the fundamentals of fair play. They require

that interested parties may be afforded an opportunity for hearing . . . "

To paraphrase Judge Stern in his *WKAT* Findings and Conclusions, the SEC, because of its predetermination of this case, "was rendered wholly unable to participate and vote with freedom and impartiality." That predetermination struck "at the very heart of the integrity of the judicial process." Petitioners "did not have a hearing before an impartial tribunal." Due process was denied, and the denial of due process is never moot.

CONCLUSION.

The court below, without dissent, held these questions of perjury, ex parte contacts and predetermination moot. Judge Stern held that the improprieties in the *WKAT* case "cannot be tolerated", and that "all must be made to realize that they cannot permanently win by such tactics." A cynic would say that the distinction between the two cases lay in the difference in the amounts of newspaper publicity given each. Apart from that we submit there is no distinction. The petition for writ of certiorari herein should be granted forthwith and the decision below should be reversed and remanded without briefs or argument, with the direction that *WKAT, Inc. v. FCC, supra*, be followed.

The suggestion that it follow that case was made to the court below in Case No. 15,989. Both cases should be so dealt with. Not to grant certiorari in this case, even though the court below remands Case No. 15,989, would not only deprive petitioners and their fellow stockholders of the justice that is their due but would set a pernicious rule of administration of justice by the press.

Respectfully submitted,

J. RAYMOND DYER,
Attorney for Petitioners.

APPENDIX A.

CHestnut 1-7028
J. Raymond Dyer
Attorney at Law
418 Olive Street
Saint Louis 2, Mo.

November 17, 1958.

Securities and Exchange Commission,
Washington 25, D. C.

Re: Union Electric Co., 315 N. 12th St.,
St. Louis 1, Mo.

Gentlemen,

This is to advise that I own 250 shares of the common stock of the above company and that my daughter Nancy Corinne Dyer, who is now 22 years old, owns 100 shares of the same.

I intend, as does Miss Dyer, whom I represent, to contest any proxy material or declaration of proxy material proposed by Union's management for use at the next annual meeting of its stockholders, scheduled for April 20, 1959, which names any of Union's present directors as management's proxy agents, or which looks to the re-election of any of those directors to Union's board.

Whether we shall solicit proxies ourselves remains to be seen, but our position as above recited has been definitely decided, in view of the position taken by Union's counsel at the hearing this morning in Dyer, Dyer & Day v. SEC and Union, Case No. 15,989, held before the U. S. Court of Appeals for the Eighth Circuit.

Very truly yours,

J. Raymond Dyer.

FILE COPY

OFFICE SUPREME COURT, U.S.
FILED
MAR 20 1958
JOHN T. FEY, Clerk

No. [redacted] 67

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1958

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

J. RAYMOND DYER,
418 Olive Street,
St. Louis 2, Missouri,
Attorney for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION and
UNION ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the mootness judgment of the aforesaid court entered January 24, 1958, in this case, numbered 15,765 below.

OPINION BELOW.

The opinion of the aforesaid court (Appendix B-1) is reported in *251 F. 2d 512.* In it the court found that the meeting of the stockholders of intervenor-respondent Union Electric Company (hereinafter called "Union"), scheduled

for April 20, 1957, had been held that day. In its judgment (Appendix B-2) the court "dismissed as having become moot" petitioners' March 29, 1957, petition to review the March 21, 1957 order of respondent Securities and Exchange Commission (hereinafter called "SEC"), which order (Appendix A-2) sanctioned the proxy material Union used in connection with that stockholders' meeting.

JURISDICTION.

The judgment was entered January 24, 1958. Rehearing was denied February 25, 1958. Jurisdiction is invoked under *28 U.S.C. 1254 (1)*.

QUESTION PRESENTED.

Whether a petition for review of an SEC order, permitting to become effective a declaration of proxy material, becomes moot after the holding of the stockholders' meeting in connection with which the SEC sanctioning order is issued.

STATUTE INVOLVED.

Sec. 24 (a) of the Public Utility Holding Company Act of 1935, *15 USC 79x*. It is set forth in Appendix A-1.

STATEMENT.[1]

PART I.

This case arose out of a controversy respecting false advertising. The false advertising that started the controversy was a full-page newspaper ad covering the atomic-

[1] This is not a Statement of the entire case. It is a Statement of only that part of the case that is essential to consideration of the mootness question presented. Since the case here involves two administrative proceedings, and two judicial proceedings resulting therefrom, the Statement is in four parts.

reactor program of the private power industry, in which ad Union, a Missouri corporation, participated, and which was published in 37 newspapers, from coast to coast, on June 13, 1956. It was found false, after a hearing, by the full House Appropriations Committee of the 85th Congress, First Session. See Exhibit 13.[2] Hon. Clarence Cannon, Chairman of that Committee, said of this case, on February 4, 1957 (Pr. Rec. 81):

> "You have touched on one of the crying needs of the time—'Truth-in-Advertising'. Vast sums of money are being spent to mislead the American people."

Petitioner Nancy Corinne Dyer, a student at Bryn Mawr College, owned 100 shares of Union's common stock. She had her father, a lawyer, protest to Union its participation in that false ad. He did, on June 28, 1956 (Item 7,

---

[2] Under the July 10, 1957, order of the court the case was heard below on the original record, without need to print. See Item 13 of the Designation of Record filed with the record herein. However, for the convenience of the court below petitioners filed a printed compilation of "Pertinent Portions of Respondent's Record on Review, being Part of Intervenor's Declaration, Part of Petitioner's Objections, Respondent's Findings and Opinion, the Order on Review, Pertinent Portions of the Evidence Adduced, in Narrative Form, and Statement Regarding Petitioners' Supplementary Record". Hereafter, that will be referred to as the "Pr. Rec."

Because they were so voluminous, and extensive, none of the exhibits were reproduced in the Pr. Rec. Hence, they are referred to by document number, i. e., "Doc. ....", as designated in the SEC's Transcript of Record, which is in turn referred to in the Designation of Record filed herein as Item 7 thereof. References herein are to that Designation of Record, which covers the record filed herewith. Thus, Exhibit 13 is "Item 7, Doc. 31; see Pr. Rec. 80". When the word "Item" is used it refers to the particular item of the Designation of Record filed with the record herein.

All statements made herein are supported by the record, though reference is not always made to the particular substantiating portion. If that were done this Statement would be less concise than it is. For example, reference to the portion of the record substantiating the statement respecting the start of this controversy would have to be "Exhibits 7 and 9, Item 7, Docs. 28 and 30; see Pr. Rec. 93". Reference to the atomic-reactor ad would be "Item 7, Doc. 2; see Pr. Rec. 93".

Doc. 28). Union sought to justify the ad (Item 7, Doc. 30). Thus the controversy started.

Then, in November of 1956, an unsavory news story broke. Union's management, it seems, had engaged in questionable lobbying activities over in Illinois, in 1955, in conjunction with Orville E. Hodge, then State Auditor of Illinois (Item 7, Doc. 15, p. 1). At least the U. S. Department of Justice subsequently found the lobbying "of questionable legitimacy" (Item 37; Pr. Rec. 106). Hodge had been sent to the penitentiary (Item 7, Doc. 15, p. 1). Union's management was on the spot. For the $35,000, it had paid for the lobbying had wound up with Hodge (Item 37; Pr. Rec. 106).

Union's president, J. Wesley McAfee, then made a report to Union's board of directors respecting the lobbying venture (Item 7, Doc. 39). That was on November 16, 1956. The board expressed its confidence in Mr. McAfee, accepted his "report", ordered it released to the press, ordered it inserted as a paid ad in the St. Louis Globe-Democrat and the St. Louis Post-Dispatch, and ordered it sent to the stockholders (Id.) All that was done.

Miss Dyer considered the "report" false and deceptive, and again had her father protest, He did, to Mr. McAfee, pointing out numerous instances of deception, trickery and falseness (Item 7, Doc. 26). He sent copies to the SEC and the Federal Trade Commission. That was on November 23, 1956.

Union took the position that Miss Dyer, being a minor, did not have the legal capacity to operate through an attorney. It ignored her father's protest. So Miss Dyer, herself, on December 31, 1956, submitted to Mr. McAfee 3 proposals for stockholder action at the next stockholders' meeting, April 20, 1957 (Item 7, Doc. 5, Ex. 10). One of these was a proposed By-Law banning false advertising and false communications to stockholders (Pr. Rec. 11).

In support, she cited Sec. 45 (a) of the Federal Trade Comsion Act, *15 USC 45 (a)*, which provides that "unfair or deceptive acts or practices in commerce, are declared unlawful."

There is likewise a statute in Missouri, *R. S. Mo. 1949, Sec. 561.660*, which renders the publication of untrue, misleading or deceptive advertising unlawful, and provides a penalty. However, it covers only advertisements related to "what defendant wished to sell", not "what he wished to buy". See *State v. Carruthers (St. L. Ct. App. 1929), 21 S. W. 2d 894*, which is the only Missouri case on that statute. Because of that, Miss Dyer concluded that it did not cover Union's false ads and false communications to its stockholders, designed not to sell its products, but to buy good will, and proxies, for its management.

Hence, she felt a prohibiting By-Law necessary. It would cover the matter, she reasoned, under the common law principles announced in *Abrams v. Textile Realty Co. (1949) 97 NYS 2d 492.* In Missouri, a corporation that violates its By-Laws acts ultra vires. Injunctions could be had by stockholders if Union had a By-Law banning false advertising. The By-Law would act as a real deterrent, since expenses and counsel fees could be allowed (Id.).

Miss Dyer's By-Law ban was rejected by Union, who put it up to the SEC. So she wrote SEC Chairman J. Sinclair Armstrong, protesting (Item 7, Doc. 33). That was on January 28, 1957. The SEC sided with Union, as will be shown.

Under *R. S. Mo. 1949, Sec. 351.290*, the power to make By-Laws is vested in the stockholders. The statute provides that "The bylaws may contain any provisions for the regulation and management of the affairs of the corporation not inconsistent with law or the articles of incorporation". Union's articles of incorporation did not preclude the adoption of such a By-Law, and the "law"

referred to in the statute is Missouri law, not SEC law. *R. S. Mo. 1949, Sec. 351.385 (11).*

Miss Dyer was not only against false advertising. She was also "against the use of improper influence in the securance of legislation." She so testified before the Joint Committee on Atomic Energy, 85th Congress, First Session, on February 28, 1957 (Item 7, Doc. 15, p. 20). She also there testified:

> "I believe that corporate managements should be truthful in their correspondence with the stockholders. I am against chicanery and deceit in corporate advertising, whether of the corporation's products or of the integrity and general superiority of its management . . . Every stockholder has a responsibility for the policy of his company, and I am assuming mine."

She did. But she was handicapped, being a minor. She could not act through an attorney. On December 17, 1956, she had brought a lawsuit against Union, in the St. Louis Circuit Court, to test that out, and lost (Item 7, Doc. 34). She took an appeal,[3] but in the meanwhile, as she wrote SEC Chairman Armstrong, she was kept too busy in college, studying, to fully assume her responsibilities as a stockholder. So her father, petitioner J. Raymond Dyer, long one of Union's consumers, on January 11, 1957, bought 250 shares of Union's common stock in his own name (Pr. Rec. 15). That enabled him to carry on with his daughter.

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[3] *State ex rel. Nancy Corinne Dyer v. Union Electric Co. et al. (St. L. App., Feb. 4, 1958), 309 S. W. 2d 649.* Since the record showed she had reached her majority while the case was on appeal relator moved for rehearing, suggesting mootness under *Atherton Mills v. Johnson (1922), 259 U. S. 13,* theretofore followed in Missouri. However, rehearing was denied, March 1, 1958. So relator applied to the Supreme Court of Missouri to accept transfer (a proceeding comparable to certiorari under Missouri Supreme Court Rule 2.06). Her application (Case No. 46,893) was denied April 14, 1958. Mootness in Missouri is a very flexible rule.

Together, petitioners submitted 10 more proposals to Union under SEC Proxy Rule X-14A-8, for stockholder action at the April 29, 1957 stockholders' meeting. See Appendix of petitioners' brief below (Item 15) for all Proxy Rules referred to herein. One proposal was a resolution banning false advertising similar to Miss Dyer's previously proposed By-Law ban. Resolutions, under Missouri law, require only the vote of a majority of the quorum. *R. S. Mo. 1949, Sec. 351.265.* Under Union's By-Law IX (Item 7, Doc. 20), which petitioners contended is illegal, the enactment of By-Laws requires the vote of a majority of all the stock outstanding.

Union excluded petitioners' two false advertising proposals from its proxy statement and proxy ballot, along with three of petitioners' other proposals. It referred in its Notice of Meeting to the resolution banning false advertising as a resolution "relating to company advertising and communications to stockholders" (Pr. Rec. 2).

A hearing was had before an SEC Hearing Examiner, March 13-15, 1957. Mr. McAfee testified that his lobbying "report" was "for all substantial purposes an accurate one" (Item 7, Doc. 16, p. 105), and was "substantially correct" (Id., p. 110). That testimony covered the "report" as released to the press, the "report" as carried as paid ads, and the entire communication respecting it as sent to the stockholders.

The "report" that had been released to the press on November 16, 1956, and published verbatim in the St. Louis Globe-Democrat, was Petitioners' Exhibit 11, excluded from evidence (Pr. Rec. 93). Another version, carried as a two-page ad in both St. Louis newspapers on November 18, 1956 (Exhibits 2 and 3), was admitted in evidence (Item 7, Docs. 24 and 25), as was Exhibit 4 (Item 7, Doc. 2), which was the "report" as mailed by Mr. McAfee to the stockholders on November 19, 1956, together with a

reprint of a November 17, 1956 editorial of the St. Louis Globe-Democrat entitled "The Union Electric Co. Situation", and his transmittal letter stating that the Globe editorial "states the case clearly". The Post-Dispatch editorial, of November 18, 1956, was diametrically opposite. It was entitled "Shady Business" (Item 7, Doc. 36). Mr. McAfee did not send that editorial to the stockholders.

Petitioners contended at the SEC hearing that Mr. McAfee's "report" was false, and offered in evidence their Exhibit 21, a press clipping from the front page of the November 23, 1956, edition of the St. Louis Post-Dispatch, headed "BAR'S OK FALSELY CLAIMED FOR UNION ELECTRIC'S BILL." As to it, Mr. McAfee testified (Item 7, Doc. 16, p. 120; Pr. Rec. 55): "I never saw headlines that were less informative, or accurate, than those were. The body of the story was quite accurate." The body of the story recited that the lobbied bill had *not* been approved by the Illinois Bar Association or the Chicago Bar Association. Exhibits 6 and 22 (Item 7, Docs. 27 and 35), being letters from both Associations to Mr. Dyer, bore that out. But Exhibit 21, which went into considerable detail, was excluded from evidence on the ground that it was hearsay, and not binding on Union (Pr. Rec. 96), despite the fact that Mr. McAfee had vouched for the accuracy of the "body" of it.

Though his "report" very plainly speaks for itself, Mr. McAfee insisted that he did not say in it that the 1955 bill (the bill that had been lobbied) had the support of "the Chicago Association, or any other association" (Pr. Rec. 55). He insisted that what he had referred to in his "report" was a 1953 bill, which had been amended in the 1955 bill by adding Amendment 28A. However, in the "report" itself he stated (Item 7, Doc. 2, Ex. 1, p. 2): "It is, I believe, important to note that the proposed amendment had the approval of several important groups.

These included the Illinois Commerce Commission and the Illinois and Chicago Bar Associations."

The Globe editorial that Mr. McAfee sent the stockholders along with his "report," stating it "states the case clearly", and the truth of which he vouched for (Item 7, Doc. 16, pgs. 105, 110), recited: "The law had the approval of the Illinois Commerce Commission and the Illinois and Chicago Bar Associations". The reference to the 1955 bill was clear. And Mr. McAfee testified (Item 7, Doc. 16, p. 131), likewise clearly referring to the 1955 bill:

> "I think it had the approval of the Bar, and everyone else. No one, Mr. Dyer, except four people in the Senate, made one word of objection to the bill that I ever heard of from that day to this".

Union's counsel, however, stated (Item 7, Doc. 16, p. 363; Pr. Rec. 87): "I will admit that a bill has been introduced in the current session of the Illinois legislature to repeal the Act that was passed in 1955".

Mr. McAfee also testified (Item 7, Doc. 16, p. 129): "I think all will agree those who were directly concerned with it, and studied it of the bar, were in favor of it. At least they didn't appear and oppose it". And (Id., p. 127): "I think that part of the bar who studied either section, if it applied directly to them, approved it. And I know the Commission approved it, so I think the statement is perfectly true".

Exhibit 21 quotes the April, 1955, minutes of the Public Utility Committee of the Chicago Bar Association, which minutes show the extent and character of the opposition. The bill was rejected by the Committee on the ground that it involved "unfair discrimination"; would "result in undue burden on interstate commerce"; imposed "burden on foreign corporations now exempt from capital stock tax requirements"; created "a dangerous precedent"; and was

"subject to attacks on constitutionality". The Committee rejected the plea of Mr. Henry Driemeyer, Union's Illinois counsel, that it approve the bill. One member of the Committee, Mr. James J. Danaher, Assistant Corporation Counsel for the City of Chicago and former member of the Illinois Commerce Commission, considered the bill, according to Exhibit 21, as a private bill presented in the guise of a public measure, which "didn't seem right" to him.

In his November 19, 1956, letter transmitting his "report" to the stockholders Mr. McAfee said (Item 7, Doc. 2):

> "I want to make it clear to you that there has been no adverse comment concerning the merits of the legislation involved. The fact is that this legislation is definitely in the public interest as is explained in the attached report which I made on Friday to the Board of Directors".

Under Proxy Rule X-14A-9, if false or misleading communications to stockholders constitute solicitations, they must be rectified. Petitioners contended at the SEC hearing (Pr. Rec. 58) that the McAfee "report" constituted solicitation material under Proxy Rule X-14A-1. Union's counsel denied that, and Mr. McAfee, who was on the stand, interposed (Item 7, Doc. 16, p. 153; Pr. Rec. 58):

> "And which I am delighted to deny under oath. There was no thought, no one had any desire to seek proxies in November. There was no thought of the annual meeting".

Since Mr. McAfee's denial of intent was hearsay as to all members of the board other than himself, petitioners requested the SEC, if it considered intent controlling under Proxy Rule X-14A-1 (and petitioners contended that intent was no criterion of solicitation under that Rule) to sub-

poena the other directors (Item 7, Doc. 15, pgs. 21, 22). However, petitioners' request was denied.

Petitioners also contended at the hearing that the proxy ballots Union's management proposed to use, under which management-appointed proxy agents could vote against all but one of petitioners' proposals, even though the stockholders executing them did not affirmatively direct that their ballots be so cast, were illegal (Pr. Rec. 68). Union contended that Proxy Rule X-14A-4 (b) sanctioned such "ghost-vote" proxy ballots. Petitioners contended that that Rule was unauthorized by the Act, since contrary to the public interest and the interest of investors and consumers.

Petitioners further contended that their 5 excluded proposals were unlawfully excluded, and that management's Notice of Meeting was deceptive and unlawful under Missouri law.

Because the points involved were numerous, and particularly because of the exclusion from evidence of their Exhibits 11 and 21, petitioners asked for oral argument before the Commission. It was denied them (Pr. Rec. 103). They were given from Friday night until noon Wednesday to file a printed brief (Id.). Under Rule IX (f) of the Rules of Practice of the SEC briefs are due 5 days after the transcript is filed, which event did not occur until the Monday. However, with the help of their New York counsel petitioners got their brief in on time (Item 7, Doc. 14).

The SEC, in its order entered the next day, March 21, 1957 (Pr. Rec. 42-44), permitted Union's declaration of proxy material to become effective as filed. In its Findings and Opinion (Pr. Rec. 26-44), issued 27 days later, April 17, 1957, three days before the scheduled stockholders' meeting, the SEC overruled all of petitioners' objections, reciting reasons in some instances, but none in others. It recited none for the exclusion from the proxy statement and proxy

ballot of Miss Dyer's proposed By-Law banning false advertising, but cited Proxy Rule X-14A-8 (c) (5) as the basis for the exclusion of the similar resolution (Pr. Rec. 36). It cited Proxy Rule X-14A-4 as the basis of its approval of the form of "ghost-vote" proxy ballot Union proposed to use (Pr. Rec. 38) and found "no basis to require any change in the notice of meeting" (Pr. Rec. 34). It likewise found (Pr. Rec. 40) no error in the Examiner's rulings excluding Exhibits 11 and 21.

As to Mr. McAfee's "report," the SEC specifically held that the stockholder communications and ads in question (Item 7, Docs. 2, 24, 25) did not "fall within the category of soliciting material" (Pr. Rec. 33), adding in a footnote:

> "Of course, we are not passing on the accuracy of the explanation made by the president of Union."

As to Mr. McAfee's denial of intent, the SEC found (Pr. Rec. 33):

> "At the time the statement was published in the newspaper and sent to Union's stockholders there was no proxy solicitation under way and no contest was anticipated in connection with the annual stockholders' meeting for 1957."

Yet Mr. Dyer had testified (Item 7, Doc. 16, p. 160; Pr. Rec. 91) that on November 16, 1956, before the meeting of Union's board on that day, he had gone to Union's offices and sought "permission to attend the meeting of the board," but that Mr. McAfee had sent word back to him that that was "impossible." Mr. Dyer had further stated (Item 7, Doc. 16, p. 200) that he had "tried to get into" the board meeting to protest Mr. McAfee's report before it was "even submitted to the board of directors." Mr. McAfee had admitted that, admitted that Mr. Dyer had written him about it, and that he had written back (Id.). Mr. McAfee's letter, Exhibit 1 (Item 7, Doc. 23; Pr. Rec. 99), refers to Mr. Dyer's efforts, and to the fact that he

was "threatening to bring a claim against the company." The claim was the original claim, that Union was engaging in false advertising (Item 7, Docs. 28, 30). Mr. AcAfee admitted that that was the claim (Item 7, Doc. 16, p. 200).

Nonetheless, and despite his admissions respecting Mr. Dyer's November 16, 1956 protest efforts, Mr. McAfee, referring to the mailing of his "report" to the stockholders on November 19, 1956, testified (Item 7, Doc. 16, p. 200): "At the time it was sent out no one had appeared in opposition, Mr. Dyer or anyone else . . . ." And further (Id., p. 202): "We certainly did not have it in mind when we sent the stuff out. Whether it was one hour, when the stuff was gone, we didn't have any demand you were anticipating some time after."

To which Mr. Dyer had replied (Id.): "If you permitted me to attend the directors' meeting, I would have advised you these statements were incorrect and misleading.[4]

PART II.

On March 29, 1957, petitioners filed in the court below, as Case No. 15,765, their verified petition to review the SEC'S March 21, 1957, order. They mailed a copy to the SEC

[4] All the foregoing Part I has been considered necessary to show the importance of this case, and what is really involved. An erroneous dismissal for mootness, in an unimportant case, constitutes no basis for certiorari. But Union is a $525 million corporation. Its president is president of Edison Electric Institute and the recognized leader of the private power industry. Union serves some 650,000 consumers, has some 10,890,482 shares of stock outstanding, held by some 61,000 stockholders of record, plus some 11,000 more who are beneficial owners. They reside all over the world. Considering that, and the issues raised, it is believed that this case has public interest. And where public interest exists an exception is made in the law of mootness. See 1941 Annotation *"Public Interest as Ground for Refusal to Dismiss on Appeal where Question has Become Moot", 132 A. L. R. 1185;* S. A. Diamond, *"Federal Jurisdiction to Decide Moot Cases" (1946), 94 Pa. L.R. 125; "Administrative Law—Questions 'Moot' on Appeal" (1947), 22 Ind. L.J. 235;* and *"Cases in Equity that Become Moot on Appeal" (1921), 34 H.L.R. 416.*

that day. In their petition (Item 1, para. 6) petitioners alleged that the SEC, "contrary to the interest of petitioners and the public interest and the interest of investors and consumers," had issued its March 21, 1957, order in advance of its Findings and Opinion, "solely as an accommodation to the management of said company," induced by its "bias and prejudice in favor of said management and against petitioners and said company's consumers and stockholders."

Jurisdiction of the court below was invoked under Sec. 24 (a) of the Act, which also specifically authorizes this certiorari proceeding. Reversal of the mootness ruling below is sought since that ruling involves jurisdiction under Art. III, Sec. 2 of the Constitution.

Union came in as an intervenor-respondent on April 8, 1957 (Item 3). On that day the SEC filed its motion to dismiss the petition for review (Item 5), alleging that petitioners were not "persons aggrieved" under the Act; that their petition for review was "frivolous and filed solely for delay"; and that it contained "impertinent and scandalous allegations unsupported by the record."

Petitioners' application for a stay (Item 2), filed with the petition for review, was argued April 8, 1957 (Item 4), and denied the next day (Item 6). The SEC did not file its transcript of the record (Item 7, Vols. I and II) until May 6, 1957. Sec. 24 (a) of the Act provides that as soon as the petition for review is served the SEC shall "thereupon" file the transcript.

Then followed extended proceedings (Items 8-13) in which petitioners sought to achieve completion of the record. Exhibits 11 and 21 (and some other exhibits) were not included. Mr. McAfee's "report" as sent to the stockholders (Item 7, Doc. 2) differed in six very material respects from his "report" as released to the press, Exhibit

11. Yet under the minutes of the meeting of Union's board on November 16, 1956 (Item 7, Doc. 39), there was only one "report" which the board had ordered released to the press and sent to the stockholders. By cunning trickery the "report" as sent to the stockholders had been rendered even more exculpatory than the "report" as released to the press. The "report" as sent to the stockholders had obviously been rewritten in the light of the very commendatory Globe editorial which Mr. McAfee had sent the stockholders, along with the second version of his "report," the truth of which editorial he had vouched for at the hearing (Item 7, Doc. 16, pp. 105, 110).

Mr. Dyer had testified at the SEC hearing (Item 7, Doc. 16, p. 161; Pr. Rec. 91) that on December 28, 1956, his daughter, in his presence, had been permitted by Union's Secretary to examine the minutes of the November 16, 1956, board meeting; that he had examined those minutes with her, as her "assistant"; that he had gone through them with a "fine tooth comb," and had made a copy in pencil "of the relevant portions." They "did not reflect what transpired at the meeting," Mr. Dyer testified (Id.; Pr. Rec. 92). Hence, he characterized them as "phony" (Item 7, Doc. 16, p. 154; Pr. Rec. 58). They differed, Mr. Dyer stated, from the minutes Union produced at the hearing (Item 7, Doc. 39).

Finally, on September 25, 1957, after the extended proceedings above referred to, the SEC filed the missing exhibits. Exhibit 11 is in Vol. III of Item 7, as Doc. 41. Exhibit 21, the "body" of which Mr. McAfee testified was "quite accurate", but which completely refutes his testimony that his "report" was "for all substantial purposes an accurate one", and "substantially correct", is filed in Vol. III of Item 7, as Doc. 46.

On August 20, 1957, petitioners filed their printed record and brief and appendix (Items 14, 15). In the latter,

p. 39, they stated that the stockholders' meeting scheduled for April 20, 1957 had been held that day.

The case was set for argument November 19, 1957. On that day petitioners filed their motion to adduce additional evidence, requesting the court, if it remanded the case to the SEC for further hearing, to turn over to the U. S. Department of Justice Exhibits 11 and 21 and that portion of the record covering Mr. McAfee's testimony, with the request that it appraise the same as regards "material perjury on the part of Mr. McAfee", and that it "submit its appraisal to respondent for use by petitioners at any hearing before respondent which may be held in conformity with such affirmative order of this court as may be entered on this motion" (Item 16).

The case was argued before Circuit Judges Sanborn and Van Oosterhout and District Judge Harper, and submitted that day (Item 17). At the argument Union moved to strike petitioners' aforesaid motion (Item 16). The SEC submitted its April 8, 1957 motion to dismiss (Item 5). None of the parties suggested mootness, nor did the court ask counsel to brief the mootness question, as did this court in *J. I. Case Co. v. Labor Board (1944), 321 U.S. 332, 334.* Instead, on January 24, 1958, sua sponte, it dismissed the petition for review "as having become moot" (Appendix B-2).

On February 12, 1958, petitioners filed their timely petition for rehearing (Item 20). Neither the SEC, nor Union, took any steps to advise the court that it considered the mootness ruling erroneous. On February 25, 1958, the petition for rehearing was denied (Item 21).

Then, on February 28, 1958, petitioners moved for stay of judgment (Item 22). Union's 1958 proxy proceedings before the SEC had already commenced. Annual stockholders' meetings are required under *R. S. Mo. 1949, Sec.*

351.225 (2), and under Union's By-Laws the 1958 meeting of its stockholders was scheduled for April 21, 1958. Union's management had already filed with the SEC its 1958 declaration, and petitioners had already filed their objections thereto. In those objections questions as to the validity of the SEC order of March 21, 1957, on which Union was relying, were raised. Petitioners contended to the SEC that it had no jurisdiction to exclude any of petitioners' proposals on the basis of that order, as Union proposed to do as regards three of them, including one that would outlaw the personal solicitation of legislators through means not addressed solely to their judgment to obtain the passage or defeat of legislation, and another that would rectify Union's illegal By-Law IX. The jurisdictional question was raised under Sec. 24 (a) of the Act, which petitioners contended gave the lower court "exclusive jurisdiction" over the March 21, 1957 SEC order until the judgment was handed down. Until then, petitioners contended, the court could vacate its judgment, or change it in any way it saw fit.

On March 6, 1958, the day the SEC hearing started, the SEC filed its response to petitioners' motion for 30 day stay of judgment. It took the position that petitioners' remedy lay in a petition for review of any 1958 SEC order entered, under which they might feel themselves aggrieved. In its response (Item 23) the SEC referred to the court's finding that the controversy was "obviously moot", and, by implication at least, approved the mootness decision.

Stay of judgment was denied March 12, 1958 (Item 25). A certified copy of the judgment was handed down March 14, 1958 (Item 26). See Appendix B-2.

PART III.[5]

In the meanwhile the SEC hearing of March 6-7, 1958, on Union's 1958 declaration of proxy material had been held, with petitioners present and participating (Item 27, Ex. B). The same issues were presented as had been presented at the 1957 SEC hearing, plus some others. This time oral argument was accorded petitioners, set for March 20, 1958.

On March 17, 1958, petitioner J. Raymond Dyer filed with the SEC his verified request (Item 34) that SEC Commissioners Orrick, Patterson, Hastings and Sargent disqualify themselves, or be disqualified, for bias and prejudice and favoritism, alleging (Item 34, p. 8) that he believed, and had just and reasonable cause to believe, that said Commissioners, "with bias and prejudice and favoritism as aforesaid, have shielded said material perjury of Union president J. Wesley McAfee, and will continue to shield it insofar as they are able." On March 18, 1958, the SEC denied that request (Item 35).

The SEC order of March 21, 1958 (Item 27, Ex. A), entered the day after the oral argument, as supplemented by the order of March 25, 1958 (Item 27, Ex. C), permitted Union's 1958 declaration to become effective. It sanctioned the proxy material of Union's management to be used in connection with the April 21, 1958, meeting of Union's stockholders. The SEC's March 21, 1958, Findings and Opinion (Item 27, Ex. B) followed the same course laid down in the April 17, 1957, Findings and Opinion (Pr. Rec. 26-41). The same type of proxy ballot was approved, and petitioners' same proposed false ad bans were excluded, this time both on the basis of Proxy Rule X-14A-8 (c) (5).

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[5] The record supporting Parts III and IV is the record in Case No. 15,989 below, filed here under Rule 23 (5) of this court. That record shows the recurring nature of the controversy.

In its March 21, 1957, order the SEC had declined to pass on the truth or falsity of Mr. McAfee's "report" on his $35,000 lobbying venture (Pr. Rec. 33), and had added: "The entire matter with respect to the $35,000 payment is now under investigation by us . . ." (Id.). But on August 9, 1957, it announced it had "discontinued its investigation" (Item 38).

The result of the U. S. Department of Justice investigation of Union's $35,000 lobby venture (Item 37) was that "the available evidence indicates a questionable transaction." Union had "purposely set in motion the chain of circumstances that they knew, or should have known, would accomplish that which, in fact, happened. Only the most naive persons could believe that Union Electric did not know that Hodge would end up with some of Browning's fee. That the exhaustive investigations disclose a devious course of conduct and engagement in transactions of questionable legitimacy by the company is beyond effective denial" (Item 37; see Pr. Rec. 106).

Such was the report which the Department of Justice issued May 24, 1957, and which it *"and the Securities and Exchange Commission"* approved for release to Mr. Dyer on August 19, 1957 (Item 37). That report scarcely substantiates Mr. McAfee's "report." The Globe editorial of November 17, 1956, based on the Exhibit 11 (Item 7, Doc. 41) version of Mr. McAfee's "report" (the truth of which editorial Mr. McAfee vouched for at the 1957 hearings [Item 7, Doc. 16, pp. 105, 110] and which he sent the stockholders [Item 7, Doc. 2] stating it "states the case clearly") states that Mr. McAfee had "taken what seems to be a completely honest course", and "had reached a high level of business statesmanship" (Item 7, Doc. 2).

In the **1958** proceedings before the SEC petitioners asked that subpoenas be issued so that they might prove the "falsity of the aforesaid testimony of Union's president

at the March 13, 1957, hearing" and the "falsity of Union's advertisements and communications to its stockholders" (Item 36). The SEC denied the subpoena request (Item 27, Ex. B, p. 17). It found (Id., p. 18) that "the accuracy of such testimony is not an issue herein", and, as regards the ads and communications, that "this material is too remote", and "is therefore not an issue in these proceedings" (Id., p. 17).

PART IV.

On April 4, 1958, petitioners filed with the court below, as Case No. 15,989, their verified petition to review the SEC orders of March 21 and 25, 1958 (Item 27), along with their verified application for a stay (Item 28). In the former they alleged, in paragraph 7, that "said SEC Findings and Opinion and Orders were entered as the result of bias and prejudice and partisanship on the part of the SEC."

Again Union intervened (Item 30), and again both the SEC and Union opposed the stay. But this time both contended that the mootness ruling in Case No. 15,765 was erroneous. See Items 29 and 31.

As stated heretofore, when petitioners' petition for rehearing in the instant case was pending, throughout the period February 12-25, 1958, neither counsel for the SEC, nor counsel for Union, advised the court below that he considered the mootness ruling erroneous. True, Rule 15 (c) of the court below recites that "no response to the petition (for rehearing) . . . will be allowed unless the court of its own motion, after the filing of the petition, otherwise directs". But "response" means "answer". Rule 15 (c) does not preclude the filing of a concurrence.

Under Rule 15 (a) of the court below the SEC could have filed its own petition for rehearing. Apart from that, no Rule, no law, no custom or practice, prevented counsel

for the SEC, once petitioners' petition for rehearing had been filed, from writing or telephoning the court, stating that he considered the mootness ruling erroneous and asking permission to file a memorandum in support of that belief. Indeed, counsel for the SEC could have done that any time before March 14, 1958, when the mootness judgment was handed down.

As it was, on March 6, 1958, in its response to petitioners' motion for stay of judgment in the instant case, the SEC approved the mootness ruling (Item 23). But on April 17, 1958, in response to petitioners' application for a stay in Case No. 15,989, it urged that it was erroneous (Item 29).

The stay sought in Case No. 15,989 was argued April 17, 1958 (Item 32), and denied the next day. In its April 18, 1958, order denying the stay the court (Circuit Judges Woodrough, Johnsen and Van Oosterhout) stated (Item 33):

> "Petitioners are, however, granted leave to brief and argue the question of mootness of the review, as related to our holding in No. 15,765, Dyer versus Securities and Exchange Commission, in connection with the hearing of this cause on its merits".

As to petitioners' brief under that order, under Eighth Circuit Rule 11 (a) it was due "40 days from the time of . . . filing of petition for review". That petition, as stated, was filed April 4, 1958, so the brief was due May 14. Because of this certiorari proceeding, and because mootness is jurisdictional under Art. III, Sec. 2, of the Constitution, petitioners asked for extension of time, pointing out that the SEC had not filed its record until April 21, 1958, and had filed a supplement thereto on April 28, 1958.

On May 6, 1958, just 8 days before petitioners' brief was due under said Rule 11 (a), the SEC opposed petitioners'

motion for extension of time. In its response to that motion, the SEC stated (Item 39, p. 2):

> "We submit that for the purpose of according petitioners additional time for the filing of their brief, no consideration should be given to the fact that petitioners may file a petition for writ of certiorari in No. 15,765, or to the pendency of such a petition even if it should be filed . . . It is our position that an extension of time for such a purpose is not warranted. There is no justification for delaying the present review on the basis of what petitioners may do in the other case."[6]

REASONS FOR GRANTING THE WRIT.

1. The mootness decision of the court below conflicts with the following Second and Fourth Circuit decisions: *Okin v. SEC (C.A. 2, 1944), 145 F. 2d 913, 914; SEC v. Okin (C.A. 2, 1943), 132 F. 2d 784, 789; In re Electric Power & Light Corp. (C.A. 2, 1949), 176 F. 2d 687, 689; Brown v. Eastern States Corp. (C.A. 4, 1950), 181 F. 2d 26, 30; South Carolina Public Service Authority v. FPC; Same v. SEC (C.A. 4, 1948), 170 F. 2d 948, 951.*

2. The mootness decision of the court below is irreconcilable with *The Chicago Junction Case (1924), 264 U.S. 258, 269-270.* It renders nugatory the provisions of Sec. 24 (a) of the Act, which accord to persons aggrieved the right to petition for review of SEC orders sanctioning proxy material. The judicial time lag will invariably outstrip the period between the entry of the SEC order and the stockholders' meeting.

3. A decision on the merits of this case is in the public interest. This is a class action, affecting a great public utility and all of its many thousands of stockholders. The lower court itself found that "a decision on the merits

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[6] Apparently mootness is a very flexible rule with the S.E.C., too.

might well be of much advantage to all parties concerned". See Appendix B-1.

4. If this mootness decision is allowed to stand no effective judicial review of any SEC order allowing proxy material to become effective will ever be possible in the Eighth Judicial Circuit, which embraces N. Dakota, S. Dakota, Minnesota, Iowa, Nebraska, Missouri and Arkansas. Under Sec. 24 (a) of the Act all stockholders residing in those states holding stock in any corporation will be obliged to seek judicial review before the U. S. Court of Appeals for the District of Columbia. A great number of people, throughout a very large area, have been adversely affected by this mootness decision.

5. There is lack of uniformity within the Eighth Circuit. The panel that passed on the stay application in Case No. 15,989, by according petitioners leave to brief and argue the mootness question therein, obviously did not follow the mootness decision herein, rendered by a different panel. The instant case should be remanded for hearing on the merits before all the Eighth Circuit Judges sitting en banc. *U.S. ex rel. Robinson v. Johnston (1942), 316 U.S. 649.*

6. The lower court misapplied the decisions dealing with political elections, cited in its opinion. A corporate election was involved here. Different principles govern. See *Aranow & Einhorn: Proxy Contests for Corporate Control (1957 Col. Univ. Press), pgs. 410-412, 422-426 and 444-476.* See *SEC v. Transamerica Corp. (DC Del. 1946), 67 F. Supp. 326 (C.A. 3, 1947), 163 F. 2d 511.*

7. A serious hinderance to the effective administration of the law has been set up by this mootness decision. The time-honored principle of judicial review of administrative decisions has been stymied behind this unjust, unreasonable and plainly wrong mootness decision, and a grave mis-

carriage of justice has resulted therefrom. The St. Louis Court of Appeals followed this mootness decision in *State ex rel. Dyer et al. v. Union Electric Co. et al., Case No. 29,859, ... S. W. 2d ....*, decided April 1, 1958, rehearing denied May 2, 1958. Unless the Supreme Court of Missouri accepts transfer of that case, and reverses it, the mootness decision herein will have set the law of Missouri. Unless this court accepts certiorari herein, and reverses this mootness decision, or unless the U. S. Court of Appeals for the Eighth Circuit overrules it in Case No. 15,989, the decision below will have set the law for that Circuit and for six other large and populous states.

8. Under Art. III, Sec. 2 of the Constitution mootness is a jurisdictional rule which precludes the rendering by federal courts of decisions in unreal controversies. It is not a rule that precludes decisions in real controversies, even though they may involve what the lower court found was "an acrimonious dispute." Cases otherwise moot may be rendered unmoot. See exceptions to the mootness rule listed in the index of Petition for Rehearing. However, acrimony is no exception to unmootness.

9. Tremendously important principles are involved in the instant case, demanding a decision on the merits. One of these is the issue of stockholder democracy versus management oligarchy. Not since *SEC v. Transamerica Corp. (C.A. 3, 1947, 163 F. 2d 511)* has a case so clearly, so basically presented that issue to a federal appellate court. There are some 8,000,000 stockholders in this country who hold stock in corporations over which the SEC has proxy jurisdiction. All will be vitally affected by the decision on the merits herein. All except management stockholders are adversely affected by the mootness decision below.

10. Another tremendously important issue presented in the instant case which demands decision on the merits is the issue of stockholder control versus SEC czarism. In

Missouri, as in most states, stockholders, not the SEC, have the ultimate control of their corporation. *R. S. Mo. 1949, Sec. 351.015 (6); Gregg v. Granby Mining & Smelting Co. (1901), 164 Mo. 616, 625, 65 S. W. 312, 313; Horwitz v. Balaban (S. D. N. Y. 1949), 112 F. Supp. 99, 101 (5).* Under the SEC order for which review is sought the SEC, without authority under any of the Acts it administers, has usurped that control. Congress gave the SEC no power to abridge state law.

11. By following *U. S. v. Hamburg-American Co. (1916), 239 U. S. 466,* the lower court followed a decision that has been distinguished almost out of existence by this court, and whittled down by many U. S. Court of Appeals decisions. See authorities cited in Petition for Rehearing, pp. 23 and 26. Controversies that recur annually are not moot. A judicial guide respecting its future conduct in proxy matters, and particularly its conduct in the 1958 Matter of Union's proxy declaration, was deprived the SEC. Such judicial guide, in the form of judicial restraint, is essential to the proper administration of proxy matters by the SEC. The deprivation thereof, accomplished by the mootness decision below, is detrimental to the national interest. Ours is a government of laws, not of men.

12. The controversy herein is not moot under *Mills v. Green (1895), 159 U.S. 651,* the parent case relied on by the court below. The April 20, 1957, stockholders' meeting, which the lower court considered as the intervening event causing mootness, was not held at the instance of petitioners, nor through the exercise of any power beyond the control of any of the parties. The meeting was held at the instance of Union, after becoming a party on April 8, 1957. Hence, the holding of that meeting did not render the controversy moot. See authorities cited in Petition for Rehearing, pgs. 24, 25.

13. Unless the writ requested be granted and the decision below be reversed, no restraint on the kind of false advertising and false communications to stockholders engaged in by Union's management is possible. Sec. 45 (a) of the Federal Trade Commission Act does not cover it, according to the Commission administering that Act. Besides, that Act imposes no penalty. *R. S. Mo. 1949, Sec. 561.660,* the Missouri false ad statute, does not cover it, according to *State v. Carruthers, supra.* The Federal Lobbying Act was held by this court in *U. S. v. Rumely (1953), 345 U.S. 41,* not to cover attempts "to saturate the thinking of the community." Indeed, any federal legislation attempting to do so would probably be held unconstitutional. *Near v. Minnesota (1931), 283 U.S. 697.* And the SEC, in abuse of its discretion, and by unlawful usurpation of authority, has held By-Laws and resolutions banning false ads and false communications to stockholders improper for stockholder action under Proxy Rule X-14A-8 (c) (5).

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted. If granted, and this court does not reverse and remand without briefs or argument, petitioners pray that the hearing before this court be held on the record as submitted herewith, without need to print. That privilege was accorded petitioners below (Item 13). No record is really needed to review the mootness decision herein.

Respectfully submitted,

J. RAYMOND DYER,

Attorney for Petitioners.

APPENDIX A.

1. Statute Involved.

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

Court Review of Orders.

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission

and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

2. **Administrative Order Involved.**

The SEC order of March 21, 1957, the review of which was sought below, is set forth in the Printed Record, pp. 42-44.

APPENDIX B.

1. Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,765.

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners, vs. Securities and Exchange Commission, Respondent, Union Electric Company, a corporation, Intervenor-Respondent.	Petition to Review Decision of Securities and Exchange Commission.

[January 24, 1958.]

J Raymond Dyer (Nancy Corinne Dyer, as a petitioner, was with him on the brief) for Petitioners.

Daniel J. McCauley, Jr., Associate General Counsel, Securities and Exchange Commission (Thomas G. Meeker, General Counsel, Aaron Levy, Special Counsel, and Joseph S. Mitchell, Jr., Attorney, Securities and Exchange Commission, were with him on the brief) for Respondent.

Robert J. Keefe (William H. Ferrell, Keefe, Doerner, Schlafly & Griesedieck, and J. M. Lashly were with him on the brief) for Intervenor-Respondent.

Before SANBORN and VAN OOSTERHOUT, Circuit Judges, and HARPER, District Judge.

SANBORN, Circuit Judge.

This case comes before us on a petition to review an order of the Securities and Exchange Commission, entitled "Order Permitting Declaration to become effective Regarding Solicitation of Proxies," entered March 21, 1957, in the Matter of Union Electric Company, File No. 68-167, a proceeding before the Commission having to do with a declaration of that Company for the solicitation of proxies from its stockholders for use at its annual stockholders' meeting scheduled to be held April 20, 1957.

The petition to review was filed under 15 U.S.C. § 79x by Nancy Corinne Dyer and her father, J. Raymond Dyer, each of whom is a stockholder of the Union Electric Company, a Missouri corporation and a holding company registered under the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U.S.C. §§ 79a et seq. The Company's offices are in St. Louis, Missouri, where the petitioners reside.

It is provided by § 79x (a): (1) that a person aggrieved by an order of the Commission, such as is here in question, may obtain a review of it by a United States Court of Appeals by filing and serving a petition praying that the order be modified or set aside in whole or in part; (2) that the Commission shall thereupon certify and file in the court a transcript of the record upon which the order complained of was entered; (3) that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive; and (4) that "The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28" U.S.C. Subsection (b) of § 79x provides: "The commencement of proceedings under subsection (a) of this section shall not, un-

less specifically ordered by the court, operate as a stay of the Commission's order."

The petitioners, at the time they filed in this Court their petition for review of the Commission's order of March 21, 1957, also filed an application for a stay of the order. The application for a stay was argued on April 8, 1957, and was denied the following day.

The declaration which, by the order of the Commission, the Company was permitted and was authorized to use in the solicitation of proxies was used by the Company in the obtaining of proxies for its annual stockholders' meeting of April 20, 1957, the meeting was held pursuant to notice, the proxies were voted, directors were elected for the ensuing year, and other business was transacted.

If it be assumed that the order of the Commission permitting the Company to use the declaration which it did use in soliciting proxies for its April 20, 1957, meeting, was, as petitioners claim, invalid when entered and subject to being modified or set aside by this Court, in whole or in part, we cannot see that any judgment or decree which we might now enter in that regard could have any practical effect. The sole purpose of the proceeding before the Commission was to prevent the Company from soliciting proxies for the annual stockholders' meeting to be held on April 20, 1957, by the use of a declaration, proxy statement and proxy form, to which the petitioners had vigorously objected because of the omission of certain proposals submitted to the Company by petitioners in the form of resolutions or amendments to its by-laws to be voted upon at the stockholders' meeting of April 20, 1957.

When it appears in an action or proceeding that the thing sought to be prevented has been done and cannot be undone by any order of the court, the case is moot. *Jones* v. *Montague*, 194 U.S. 147, 153.

The duty of a court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. Green, 159 U.S. 651, 653. See also and compare, *California* v. *San Pablo and Tulare Railroad Co.*, 149 U.S. 308, 313-314; *Richardson* v. *McChesney*, 218 U.S. 487, 492; *Stearns* v. *Wood*, 236 U.S. 75; *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 475-476; *United States* v. *Alaska Steamship Co.*, 253 U.S. 113, 115-116; *Industrial Development Co. of Little Rock v. Thompson*, 8 Cir., 231 F.2d 825, 828-829 and cases cited.

The fact that a decision in a moot case will establish a rule for controlling predicted future conduct does not give the court any authority to decide it on the merits, and "No stipulation of the parties or counsel * * * can enlarge the power, or affect the duty, of the court in this regard." *United States* v. *Hamburg-American Co.*, supra, pages 475-476 of 239 U.S.; *United States v. Alaska Steamship Co.*, supra, page 116 of 253 U.S.

"A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Association of St. R. Employees* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418.

Neither the Commission nor the Union Electric Company has raised any objection to our deciding this case upon the merits. In their briefs and arguments they have treated it as still a live and subsisting controversy. A decision on the merits might well be of much advantage to all parties concerned, and perhaps would tend toward putting an end to an acrimonious dispute. However, it seems so obvious to us that the controversy is moot and the ques-

tions argued purely academic that we must refrain from expressing any opinion about them.

Since the order of the Commission with respect to the form and contents of the Company's declaration for the solicitation of proxies for the April 20, 1957, annual meeting of its stockholders is not res judicata and will not tie the Commission's hands in the future, our conclusion is that the petition to review should be dismissed for mootness, without requiring a vacation of the Commission's order of March 21, 1957, in order "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." See, *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41, and *Industrial Development Co. of Little Rock* v. *Thompson*, supra, page 829 of 231 F.2d.

The petition to review is dismissed as having become moot.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

2. Judgment Below.

As certified by Eugene C. Fisher, Acting Clerk, on March 14, 1958, and mailed to the parties that date:

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15765—September Term, 1957.

Nancy Corinne Dyer and J. Raymond Dyer, Petitioners, vs. Securities and Exchange Commission, Respondent, Union Electric Company, a Corporation, Intervenor-Respondent.	Petition to Review Decision of Securities and Exchange Commission.

This cause came on to be heard on the petition of petitioners to review an order of the Securities and Exchange Commission, entitled "Order Permitting Declaration to become effective Regarding Solicitation of Proxies," entered March 21, 1957, in the Matter of Union Electric Company, File No. 68-167, transcript of record from the Securities and Exchange Commission, printed record and supplemental record of petitioners, motion of petitioners to adduce additional evidence, and motion of respondent to dismiss the petition to review, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the petition to review order of the Securities and Exchange Commission entered on March 21, 1957, in this cause, be, and the same is hereby, dismissed as having become moot, in accordance with opinion of this Court this day filed herein.

January 24, 1958.